INTRODUCTION

The Sixth Amendment's right to effective assistance of counsel rests on defense counsel for the accused zealously and thoroughly investigating his client's case in order to present a viable defense. However, in far too many cases, defense attorneys conduct no investigation, hire no experts to assess physical evidence, and call no witnesses. Such inaction leaves a defendant not only convicted of criminal charges but hamstrung in his ability to bring constitutional challenges during his state and federal appeals. For both Floyd Perkins and Carlos Trevino their direct appeal counsel failed to properly raise ineffective assistance of counsel claims which precluded their ability to have their constitutional claims reviewed by later appellate courts. However, the legal treatment of these two men differed even though the underlying issue, the absence of factual development of constitutional claims, affected them the same.

In the Supreme Court's 2012 term, it decided both *McQuiggin v. Perkins*[1] and *Trevino v. Thaler*,[2] two cases involving the repercussions of the untimely presentation of factual evidence in federal habeas corpus. In *Perkins*, those with colorable claims of actual innocence filed beyond the one year statute of limitations may receive review of their habeas petitions so long as federal courts consider the delay when evaluating whether the inmate is actually innocent.[3] The amount of flexibility in deciding untimely innocence petitions is questionable given the Court's discussion during the *McQuiggin v. Perkins* oral argument and subsequent opinion.[4] Where an inmate takes years beyond the statute of limitations to file his innocence habeas petition, such a delay may undermine the credibility of his factual evidence. When evaluating the delay beyond the statute of limitations, federal courts must take into account whether the inmate: 1) had effective assistance of counsel in the trial and appellate phases; and 2) is currently represented or pro se in federal habeas corpus proceedings.[5] Focusing on these two points helps clarify why an inmate's federal action was untimely because inmates must explain why their factual development could not have been presented in earlier appeals. Counsel representing someone wrongfully convicted must correct lapses in factual investigation in order to substantiate a federal procedural innocence claim. Federal courts are already instructed to consider the repercussions of lax factual development for ineffective assistance of counsel claims.

The Supreme Court's decisions in *Martinez v. Ryan*[6] and *Trevino v. Thaler*[7] emphasize the importance of full, factual investigation that must occur during pretrial proceedings. Defense counsel is constitutionally obligated to complete this investigation during that time period. When collateral counsel fails to raise ineffective assistance of counsel for trial counsel's failures, habeas counsel now has a procedural pathway to systematically address a valid Sixth Amendment

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1 133 S. Ct. 1924 (2013).

2 133 S. Ct. 1911 (2013).

3 *Perkins*, 133 S. Ct. at 1928.

4 *See Id.* at 1928 ("We caution, however, that tenable actual-innocence gateway pleas are rare. . . . Our opinion clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay . . . as a factor in determining whether actual innocence has been reliably shown."); Transcript of Oral Argument, *Perkins*, 133 S. Ct. 1924 (2013) (No. 12-126) (demonstrating the sharp disagreement between the Justices as to the extent of flexibility allowed).

5 *See generally* Martinez v. Ryan, 132 S. Ct. 1309 (2012); *Trevino*, 133 S. Ct. 1911.

6 132 S. Ct. at 1318–19.

7 133 S. Ct. at 1918–19.

claim. The problem arises over the difference between the federal court's treatment of actual innocence gateway claims compared with ineffective assistance of counsel constitutional claims. As a practical matter, raising ineffective assistance of counsel in federal habeas petitions now provides an easier means to constitutional relief than actual innocence claims given the Supreme Court's constantly evolving interpretation of the Antiterrorism and Effective Death Penalty Act ("AEDPA").

When innocence is at issue, federal courts should leniently evaluate innocence-gateway petitions filed beyond the statute of limitations because these delays are necessary to satisfy the high factual burden of proof. Wrongfully convicted people face delays in promptly bringing their evidence because they need proof consisting of witness interviews, physical evidence, or records in the custody of various state and federal agencies to validate their claim—all of which is nearly impossible to gather while locked in a jail cell.[8] Yet, these legal hurdles must be addressed by the wrongfully convicted as they seek to build a colorable claim of actual innocence.

The limited number of competent counsel representing those who are actually innocent further exacerbates the problem given that these attorneys must review, investigate, and navigate their cases through numerous state and federal procedural hurdles. Inmates who have potential claims of actual innocence often wait years for innocence based organizations to assist them if they hope to successfully navigate the complex world of criminal collateral appeals. Inmates who cannot obtain representation must file both state post-conviction and federal habeas petitions pro se, and with almost non-existent resources to learn the law, conduct the requisite investigation, and properly litigate their claims through the appellate process. In almost all cases, these inmates fail to obtain substantive review of their claims, due not only to their struggles with the law, but also to their failure to recover from deficiencies left for them to deal with by prior counsel.

Floyd Perkins found himself having to represent himself in state post-conviction and federal habeas corpus proceedings after failing to obtain legal counsel to assist him in establishing his actual innocence.[9] After waiting six years from the end of his state post-

8 *See* Daniel Givelber, *The Right To Counsel In Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1395, 1409 (1999) (discussing the difficulty of gathering evidence while in prison and the lack of process guarantees post conviction that exacerbate the problem).

9 *See* Brief of Respondent at 10, McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (No. 12-126) (describing Perkins' efforts to obtain legal counsel prior to filing his petition pro se).

conviction proceedings, he finally gave up seeking assistance and filed his federal habeas petition pro se.[10] During the eleven years from the time his federal statute of limitations began to run, Perkins and his family investigated and found evidence supporting his actual innocence.[11] During the oral argument and subsequent decision, the Court's opinion cast significant doubt on the strength of his evidence of actual innocence because of the delay. However, the Court failed to appreciate why it took Perkins so long to file his habeas petition. His delay stemmed from his lack of competent legal assistance in gathering and litigating his case. Perkins relied on his family to aid him in locating witnesses and gathering affidavits, who were untrained in how to satisfy Perkins' legal burdens.[12] Moreover, Perkins was incarcerated during this entire process, where he lost part of his file when the prison flooded and a riot occurred.[13] These impediments hampered his ability to properly comply with the one year statute of limitations mandated by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[14]

In contrast to Perkins' case, Martinez's post-conviction counsel failed to raise an ineffective assistance of trial counsel claim as she should have done under the Arizona court rules.[15] Instead, she explained to the court that there were no viable constitutional claims to be raised.[16] In reviewing his case, the Supreme Court found that Martinez's federal habeas counsel could assert "cause" for the ineffective assistance of counsel of his post-conviction counsel for failing to raise an ineffective assistance of trial counsel claim in accordance with state law.[17] If the ineffective assistance of trial counsel claim were viable, it would serve as prejudice for disregarding the state procedural bar, allowing the federal court to reach the merits of the constitutional claim. The Court's rationale rested on the importance of evaluating the factual development during the trial phase since ineffective assistance of trial counsel claims may only be properly evaluated

10 *Id.*

11 *See Perkins*, 133 S. Ct. at 1929 (discussing the three affidavits Perkins filed to support his claim of actual innocence); Brief of Respondent, *supra* note 9, at 9–10 (describing Perkins' attempts to gather additional evidence with the help of his sister).

12 Brief of Respondent, *supra* note 9, at 9–10.

13 *Id.*

14 28 U.S.C. § 2244(d) (2012).

15 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1314 (2012) (noting that Perkins' counsel neglected to assert that trial counsel was ineffective and subsequently submitted a court filing explaining that she could not identify any viable claims altogether).

16 *Id.*

17 *Id.*

in collateral proceedings.

Treating inmates arguing their actual innocence beyond the statute of limitations differently than those with ineffective assistance of counsel claims is problematic because both groups suffer from the same problem: their prior attorneys' negligence in investigating their constitutional claims prevented them from complying with procedural requirements of later appeals. Even though habeas corpus evaluates these issues differently, the underlying basis for the problem is the same. While the wrongfully convicted are allowed to file out of time, when they do so without the benefit of proper counsel, their attempts to explain the delay and the constitutional errors of prior counsel may be legally inadequate. This is similarly the case for those raising only ineffective assistance of counsel. The devastating ripple effect which occurs when trial attorneys fail to adequately perform within their constitutional mandate must be taken into account to a greater extent for those averring actual innocence. Federal courts need to adopt a lenient approach to the practical difficulties of bringing new evidence of innocence in federal habeas corpus whether ineffective assistance of counsel is raised or actual innocence.

Part I of this Article discusses the Court's treatment of *Perkins* within the context of existing actual innocence jurisprudence. Part II focuses on the difficulties inmates have in litigating their claims, either pro se or through innocence projects. Part III looks into the Court's *Martinez* and *Trevino* decisions in light of the need for counsel to fully evaluate and gather evidence in order to protect the constitutional rights of the accused. Finally, Part IV analyzes the inconsistencies in the Court's jurisprudence between its treatment of inmates raising only factually-related constitutional claims and that of inmates' development of new fact evidence. Part V suggests how federal courts should interpret *Perkins* in light of the Court's procedural expansion of ineffective assistance of counsel.

I. *MCQUIGGIN V. PERKINS* AND THE ELEVEN-YEAR DELAY

A. The Facts of the Case

Floyd Perkins was convicted of first degree murder in the death of Rodney Henderson in Flint, Michigan.[18] The trial court sentenced him to life in prison without the possibility of parole.[19] According to Perkins, he, Henderson, and a third man, Damarr Jones, attended a

18 Brief of Respondent, *supra* note 9, at 4.

19 *Perkins*, 133 S. Ct. at 1929.

party the night of Henderson's murder. Later that evening, all three left the party to go to a convenience store, after which Perkins left on his own to go to his girlfriend's house. Jones and Henderson left on their own.[20] Later that night, as Perkins left his girlfriend's house, he saw Jones covered in blood.[21] Criminologists later identified the blood as being consistent with that of the victim, Henderson. During Perkins' trial, the state's theory of the crime involved Perkins killing Henderson while Jones watched.[22] While all the physical evidence largely pointed to Jones, the police and prosecution chose not to charge him, even though they admitted he was involved in the homicide.[23] The prosecution's willingness to accept Jones' version of events was problematic given his motivations for wanting Henderson dead:

> Perkins testified that he and Henderson never fought. Their relationship was limited to 'drink[ing] beer together, talk[ing] to girls, that was it.' Jones, on the other hand, had a motive to kill Henderson, as Jones and Henderson had previously been involved in a car theft, and rumors circulated that Henderson had snitched to the police. Perkins had nothing to do with the stolen car.[24]

Perkins took the stand to explain his lack of involvement in Henderson's death and how Jones left with the victim after Perkins went to buy cigarettes.[25] The jury convicted Perkins sentencing him to life without the possibility of parole.[26]

Perkins took eleven years to file his federal habeas petition because of the lack of factual development during earlier proceedings,

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20 Brief of Respondent, *supra* note 9, at 4–5.

21 *Id.*

22 *Perkins*, 133 S.Ct. at 1929.

23 Joint Appendix at 114, McQuiggin v. Perkins, 133 S. Ct. 1924 (2012) (No. 12-126) ("And in particular, you heard him testify that he hasn't been promised anything, no charges have been brought against him, but he hasn't been promised anything at all. And I want you to know that because nobody is sitting here telling you that Damarr Jones is totally innocent in this. I want you to know that. Nobody's foolish; all right. But in this particular trial, the issue is Perkins. Okay. So I just don't want you to get caught up in Damarr Jones right now. The evidence shows that Damarr Jones was involved; okay. But, it's Perkins right now.")

24 Brief of Respondent, *supra* note 9, at 5-6; *see also* Joint Appendix, *supra* note 23, at 95 (recounting Perkins' trial testimony about his relationship with Rodney Henderson); Appendix to Brief of Petitioner-Appellant, at 468, 484, 488, Perkins v. McQuiggin, 670 F.3d 665, 674 (6th Cir. 2012) (No. 09-1875) (explaining that Jones may have had a much stronger motive to commit the murder).

25 *See Perkins*, 133 S. Ct. at 1929 (recounting Perkins' testimony that he did not commit the murder).

26 *Id.*

namely at trial and direct appeal.[27] By the time Perkins began representing himself in state post-conviction proceedings, it was too late to conduct much factual development due to his incarceration. The Sixth Amendment guarantees effective assistance of counsel during both trial and first appeal, i.e. direct appeal.[28] For Perkins, his trial counsel did little to develop his alibi or present other evidence proving his innocence.[29] Perkins filed a pro se appellate motion after his direct appeal counsel neglected to include a newly discovered evidence claim based on two affidavits of Jones' confession to the murder.[30] The only ineffective assistance of counsel claims ever raised on his behalf were by Perkins filing pro se in his supplemental brief on direct appeal and again during state post-conviction proceedings.[31] Contrary to the assertion that Perkins intentionally sat on evidence showing his innocence, he presented affidavits showing innocence at the first available opportunity on both direct appeal and state post-conviction proceedings; however, the state courts gave no credence to the pro se claims.[32] Because of the ineffective assistance of both his trial and appellate counsel, Perkins faced significant obstacles both

27 The three levels of review for felony convictions—direct appeal, state post-conviction, and federal habeas corpus—allow state prisoners to challenge their convictions in both state and federal court. Substantive claims raised in each appeal vary considerably depending on the state criminal code. In many states, direct appeal is limited to the four corners of the trial record, which means that only the errors appearing in the transcript may be raised. Because of the complexity of both state post-conviction and federal habeas corpus proceedings, the failure to properly raise the legal basis along with all supporting facts can result in both systems dismissing the case on procedural grounds. The Supreme Court has made clear that constitutional claims exceeding the scope of the trial record, such as some ineffective assistance of counsel claims, must be brought at the first available opportunity, i.e. either on direct appeal or state post-conviction proceedings. Tiffany Murphy, *Futility of Exhaustion: Why* Brady *Claims Should Trump Federal Exhaustion Requirements*, 47 U. MICH. J.L. REFORM 697, 707–08 (2014).

28 Strickland v. Washington, 466 U.S. 668, 700 (1984) (holding that some error by counsel was harmless and did not substantiate a habeus claim); Douglas v. California, 372 U.S. 353, 357–58 (1963) (holding that direct appeal counsel must be effective under the Sixth Amendment).

29 *See* Brief of Respondent, *supra* note 9, at 9–10.

30 *Id.* at 6–7.

31 *Id.* Interestingly, Perkins might have been more successful asserting his innocence arguing cause and prejudice under *Martinez* and *Trevino* given the lapses in his counsel and the failure to provide counsel in state post-conviction. *See infra* Part III; Givelber, *supra* note 8, at 1410–12. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-3.6 & cmt, 4-4.1 & cmt., 4-8.3 & cmt., 4-8.6 & cmt. (Am. Bar Ass'n, 3d 1993) (discussing the obligations of defense counsel to conduct a factual and legal investigation thoroughout all phases of a criminal case from charging through appeals in both state and federal court).

32 *See* Brief of Respondent, *supra* note 9, at 6–8.

procedurally and substantively in seeking to have a court give him a full and fair review of his evidence.

Perkins' family members took up the mantle of investigating his case when his attorneys failed to do so. They looked for witnesses not presented during trial to substantiate his innocence. His sister, Rhonda Hudson, drafted affidavits of conversations with people who knew Jones and heard him brag about killing Henderson. One newly discovered witness:

> detailed a conversation between Hudson and Louis Ford in March 1993, the month Henderson was murdered. Ford, who occasionally socialized with Perkins, Jones, and Henderson, told Hudson that he had been at a house where Jones had been bragging about stabbing Henderson. Jones told Ford that he took his clothes to the cleaners and 'laughed about it.' Ford refused to report this information to the police, but Hudson found a dry-cleaning clerk who remembered a man matching Jones's description entering her store with blood-covered clothing.[33]

Perkins filed this affidavit along with one from another witness, Demond Louis, who had also heard Jones confess to killing Henderson and had gone with Jones to dump some of the bloody clothing the day after Henderson's murder.[34] Both of these affidavits were presented to the state courts along with legal claims of actual innocence. The state post-conviction court summarily denied relief without ever assessing whether Perkins had competent counsel during either his trial or direct appeal.[35]

What transpired next is what often faces those wrongfully convicted. Without the assistance of counsel or investigators to review his materials, Perkins was left on his own to gather the records, locate and interview any other witnesses establishing his actual innocence, and prepare a petition asserting the same in federal court. For Perkins, whose highest level of education was a GED, understanding and gathering the relevant legal materials necessary for his appeals was challenging. He sought for years to locate the transcripts and defense files from his attorneys.[36]

His family was finally successful in tracking down a third witness, the dry cleaner who spoke with Jones immediately after Henderson's

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33 *Id.* at 7.

34 McQuiggin v. Perkins, 133 S. Ct. 1924, 1929–30 (2013).

35 *See* Brief of Respondent, *supra* note 9, at 7–8.

36 *Id.* at 9–10; *see also* Brief Amicus Curiae For Former and Current Law Enforcement Officials in Support of Respondent at 17, McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (No. 12-126) (noting one of the obstacles for a wrongfully convicted innocent prisoner is the need too "carefully go through boxes and boxes of the State's files and records, including transcripts of the proceedings against him").

murder.[37] Her affidavit explained how "a man matching Jones's description entered the shop and asked her whether bloodstains could be removed from the pants and a shirt he brought in. The pants were orange, she recalled, and heavily stained with blood, as was the multicolored shirt left for cleaning along with the pants."[38] Armed with this third affidavit, Perkins sought new legal counsel to represent him in federal court after finishing his post-conviction process years prior. However, he still faced hurdles preventing him from promptly filing his newly discovered evidence. During a prison riot, Perkins lost a part of his court record necessary for his federal appeal. The remaining records were lost when the prison flooded.[39] Once he was able to get copies of these records, he solicited several innocence projects for assistance but received no assistance.[40] Facing the reality of representing himself again, Perkins prepared and filed his petition eleven years after his direct appeal conviction became final.[41]

B. The Supreme Court's Discussion About Perkins and His Innocence Claim

The crux of Perkins' difficulty in satisfying the federal innocence standard is presenting the factual proof when the petition is filed. *Schlup v. Delo* established the federal legal standard for a gateway claim of actual innocence.[42] Newly discovered evidence not considered by a jury must be presented along with a constitutional violation in order to trigger the innocence gateway. The gateway then allows any procedural problems to be waived and permits federal courts to review the constitutional claim on the merits.[43] What qualifies as newly discovered evidence is "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[44] At the time a defendant files his petition for writ of habeas corpus, all evidence fitting within these categories must be submitted to the district court. Petitioners are expected to file their evidence supporting not only why they are innocent, but must also establish the requisite constitutional violation as well. While a form

37 Brief of Respondent, *supra* note 9, at 9.

38 *Perkins*, 133 S. Ct. at 1930.

39 Brief of Respondent, *supra* note 9, at 9.

40 *Id.* at 10.

41 *Id.*

42 513 U.S. 298 (1995).

43 *Id.* at 316; *see also* House v. Bell, 547 U.S. 518, 555 (2006) (holding that the innocence gateway will allow a procedural finding of innocence where factual evidence of actual innocence is used to remove any procedural defects in an inmate's habeas petition so long as he supplements this evidence with a viable constitutional claim).

44 *House*, 547 U.S. at 537.

may be used as a guide for the inmate, without the additional validating documentation, the inmate often faces a motion to dismiss or a motion for summary judgment from the state. Alleged constitutional claims must also be pled with specificity. While there may be an opportunity through federal discovery to broaden the scope of the evidence, a defendant must first establish very credible grounds that his claim is viable and demonstrates innocence.[45] Without that showing, a defendant will likely never have the opportunity to further the factual development of his claims.

A consistent thread in the evaluation of new evidence of actual innocence is a court's assessment of the timing of such evidence.[46] As established by both *Schlup* and *House*, the Court will consider the timing of the inmate's gateway claim petition. A federal court's evaluation looks at the time between when the inmate's conviction was finalized in state court, either on direct appeal or post-conviction, compared to the time it took to present the factual support to a court.[47] For example, in *Herrera v. Collins*, the Court assessed whether Leonel Herrera was factually innocent, but the opinion also highlighted the difficulties of potentially retrying him ten years after his initial conviction.[48] Without ample proof of what led to the delay between conviction and the location of evidence of factual innocence, the likelihood of success is slim.

The other difficulty with the gateway innocence standard is the burden of proof the inmate must satisfy. The Court found in *Schlup* and reaffirmed in *House v. Bell* that a petitioner must demonstrate, "it is more likely than not that no reasonable juror would not have found petitioner guilty beyond a reasonable doubt."[49] It reiterates that the pool of inmates able to satisfy the exacting standard will be small.[50] Federal courts have held fast to this principle, although the steady rise of exonerations since *Schlup* has cast doubt as to how small the pool actually is.[51] Even where an inmate is successful in establish-

45 RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 6 (2012), www.uscourts.gov/file/rules-governing-section-2254-and-section-2255-proceedings.

46 *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 332) ("[The court] rather may 'consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.'").

47 *Id.*

48 Herrera v. Collins, 506 U.S. 390, 403–04 (1993) (holding that a free-standing claim of actual innocence is insufficient to grant federal habeas corpus relief).

49 *House*, 547 U.S. at 537.

50 *Perkins*, 133 S. Ct. at 1928.

51 As of April 4, 2016, there have been 1769 exonerations in this country according to the National Registry of Exonerations. NATIONAL REGISTRY OF EXONERATIONS,

ing the innocence gateway, the constitutional claim required must also be viable. The inmate's habeas petition must provide the factual support for each element of that constitutional claim in their federal habeas corpus petition.

After Perkins filed his pro se petition, the federal district court dismissed it for his failure to comport with the statute of limitations and his lack of diligence in pursuing evidence of innocence.[52] Perkins appealed the denial to the Sixth Circuit Court of Appeals, asking it to consider whether the one year statute of limitations, when missed, necessitated a due diligence requirement prior to a finding of actual innocence.[53] The Sixth Circuit reversed the district court based on its precedent established in *Souter v. Jones*. *Souter* held that an untimely inmate's claim may still pass through the actual innocence gateway beyond the 2244(d) statute of limitations on equitable tolling grounds.[54] According to the Sixth Circuit, diligence, with respect to promptly filing newly discovered evidence of innocence, is not a prerequisite to a finding of innocence.[55] Because habeas corpus is an equity action seeking to protect against miscarriages of justice,

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https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Apr. 11, 2016). Further, researchers suggest the rate of wrongful convictions in this country is 2–5% percent of the current prison population. *See, e.g.*, D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007); Samuel Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. U.S.A. 7230, 7233 (2014). *But see* Marvin Zalman, *Qualitatively Estimating the Incident of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 226, 230 (2012) (suggesting the rate of wrongful convictions is between .005% to .01% of all felony convictions).

52 *See* Brief of Respondent, *supra* note 9, at 11.

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244 (d)(1).

53 Brief of Respondent, *supra* note 9, at 12.

54 395 F.3d 577, 580 (6th Cir. 2005).

55 *Id.* at 600, 601 n.4. For other circuit court decisions finding untimely gateway innocence petitions may be heard, see Rivas v. Fischer, 687 F.3d 514, 552 (2d Cir. 2012); Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011) (en banc); Sandoval v. Jones, 447 F. App'x 1, 4-5 (10th Cir. 2011); San Martin v. McNeil, 633 F.3d 1257, 1267-68 (11th Cir. 2011) (dictum); Riva v. Ficco, 615 F.3d 35, 44 n.4 (1st Cir. 2010).

requiring a preliminary finding of due diligence would undermine the otherwise-viable claims of innocent people.[56] The Sixth Circuit's ruling took into account the difficulties facing the wrongfully convicted as they seek the evidence necessary to present a prima facie case of actual innocence. When Perkins' case reached the Supreme Court, the briefing and oral argument centered on the perceived laxness by Perkins after his state conviction until he filed his habeas corpus petition.

During the *Perkins* oral argument, several members of the Court struggled with how diligence, within a recognized miscarriage of justice exception, should apply. One facet of the argument focused on the possibility that an inmate with a colorable claim might intentionally sit on evidence of innocence until a more favorable time to file.[57] However, Perkins explained that the difficulties pro se inmates face in satisfying the high burden of proof makes diligence an illusory concern. While it is improbable that inmates would sit on evidence, the Court's opinion required federal courts to consider the delay in ascertaining whether an inmate is innocent.[58] The frequency of such an occurrence happening is small because of the desire of a wrongfully convicted inmate to seek his freedom from prison. To argue that an innocent inmate would wait years, languishing in prison, while witnesses who may provide concrete proof of that inmate's factual innocence die, is beyond the pale.[59] Further, documentary proof

56 Perkins v. McQuiggin, 670 F.3d 665, 674 (6th Cir. 2012); *see also* Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the* Schlup v. Delo *Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225, 233–34 (2008) (arguing that the shift toward allowing innocent inmates to use equitable tolling principles to prevent manifest injustices has not achieved its purpose).

57 Transcript of Oral Argument, *supra* note 4, at 24, 47.

58 *Perkins*, 133 S. Ct. at 1935–36 ("Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. Perkins so acknowledges. As we stated in *Schlup*, '[a] court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bears on the probable reliability of . . . evidence [of actual innocence].' Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence. The State fears that a prisoner might 'lie in wait and use stale evidence to collaterally attack his conviction . . . when an elderly witness has died and cannot appear at a hearing to rebut new evidence.' The timing of such a petition, however, should seriously undermine the credibility of the actual-innocence claim.") (citations omitted).

59 *See* Brief for The Innocence Network as Amicus Curiae in Support of Respondent at 3, *Perkins*, 133 S. Ct. 1924 (2013) (No. 12-126) (describing the obstacles facing inmates asserting actual innocence and noting specifically that inmates "have every incentive to seek habeas relief as expeditiously as possible"); *see also* Daniel S. Medwed, *Up the River Without*

can be systematically destroyed or physical evidence lost the longer a case takes to reach litigation. Once convicted, the burden remains on the inmate to provide hard evidence showing his actual innocence. There is no benefit to waiting. In most cases, time is the enemy of the innocent, more so because, with every passing day or week of delay, it becomes exponentially harder to locate witnesses and evidence.[60] The Court's lack of appreciation of this difficulty is strange given its understanding of the hurdles facing inmates raising fact-based constitutional claims.

Counsel for the Petitioner, on behalf of the State of Michigan, and some of the Justices, repeated the notion that filing a habeas petition based on actual innocence requires little effort even for one proceeding pro se. As counsel for Petitioner stated:

> [B]ut filing the habeas petition itself is not something that takes great difficulty. Every district court, on their website, has a place where you click for forms. In the Eastern District of Michigan, when you click that, the very first two entries are habeas petitions for Federal prisoners and State prisoners.
>
> And it's a relatively simple form. You check some boxes, say when your conviction was, and you write your claim. And then every Federal district court in the country has full-time pro se staff attorneys who go through these pro se petitions.
>
> And, if there is a legitimate claim there, then they can work that up for the judge, if necessary, and the State will respond.[61]

Justice Alito continued this idea when questioning Perkins' counsel about the five-year delay between the end of the state post-conviction proceeding and the filing of Perkins' initial federal petition. Justice Alito appeared to be wary of applying leniency to any diligence re-

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a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts, 47 ARIZ. L. REV. 655, 678 (2005) (noting that rigid time limits to post-conviction review in a number of states further encourage state prisoners not to delay new evidence claims).

60 *See* Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 368 (2011) ("The average project receives approximately sixty-six cases per year that require serious investigation, but it may take longer than a year to complete the investigation for all sixty-six cases. If additional investigation is necessary, the investigative process will be extremely case-specific depending on the requestor's claim, but may include: interviewing the requestor, searching for new DNA, testing existing DNA, interviewing people involved in the case (witnesses, experts, family members), obtaining trial transcripts and/or police reports, investigating the crime scene, and/or meeting with the requestor's prior counsel and/or prosecutor.") (citations omitted).

61 Transcript of Oral Argument, *supra* note 4, at 8. *But see* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1222–28 (2012) (discussing the numerous procedural and substantive challenges facing pro se inmates attempting to navigate federal habeas corpus litigation).

quirement due to the simplicity of the filing process: "You said he couldn't get a lawyer. He really didn't need a lawyer to do this. He didn't have access to a library. This isn't a legal issue—isn't a complicated legal issue. It's a factual issue, that anybody who watches detective shows on TV can understand."[62] These comments belie the complexity of federal habeas corpus litigation. Further, many inmates do not have Internet access or understand how to work a computer.[63] Given that prisons are consistently eliminating educational programs and limiting inmates' library access, filing a federal habeas petition is not nearly as simple as the Court and the state make it seem.[64] While forms may be readily available, knowledge of the triggering events under part of the habeas corpus statutes of limitations, exhaustion, and defaults is not.[65] Any misstep in one of these procedural hurdles of federal habeas may result in a dismissal of a petition, even before a potential innocence issue comes into play.[66] Further, inmates must plead with specificity and provide factual support for both the evidence establishing a miscarriage of justice and the merits of the constitutional claims upon which the writ of habeas corpus must be granted.[67] It is clear that merely filling out a form does not come

62 Transcript of Oral Argument, *supra* note 4, at 54.

63 *See* Jonathan Abel, *Ineffective Assistance of Library: the Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1211-15 (2013) (discussing the difficulties facing inmates who are computer illiterate as prison libraries institute Westlaw and Lexis computer software as their library access).

64 *See* Evan R. Seamone, Fahrenheit 451 *on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-*Lewis *Blaze Consuming Their Law Libraries*, 24 YALE L. & POL'Y REV. 91, 91–92, 112–13 (2006) (noting the widespread defunding and outright elimination of prison law libraries in Arizona, California, Florida, Idaho, Iowa, and New Mexico, and attributing the losses to the Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), which denied inmates a constitutional right to access legal research materials).

65 *See* 28 U.S.C. § 2244(d)(1) ("A [one]-year period of limitation shall apply to an application for a writ of habeas corpus."); 28 U.S.C. § 2254(b) (2012) ("An application for a writ of habeas corpus . . . shall not be granted unless . . . (A) the applicant has exhausted the remedies available in the courts of the State."); *see also* Wainwright v. Sykes, 433 U.S. 72, 78–79 (1977) (describing the four procedural hurdles that a habeas petitioner must address for every claim prior to receiving substantive review of that claim: 1) cognizability in federal court; 2) deference to state court rulings; 3) exhaustion; and 4) procedural default).

66 28 U.S.C. §§ 2244, 2254; *see also* 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 3.4(b) (6th ed. 2011).

67 *See* House v. Bell, 547 U.S. 518, 536-37 (2005) (explaining that a gateway innocence claim requires that the inmate show both new evidence of innocence and evidence of a constitutional error at trial); Schlup v. Delo, 513 U.S. 298, 316 (1995) (same). *But see* Herrera v. Collins, 506 U.S. 390, 399-402 (1993) (finding that a conviction based on a procedurally error-free trial, coupled with the absence of a constitutional claim, was insufficient to support granting clemency where the action was based solely on a freestanding claim of innocence).

close to satisfying all of the procedural or substantive requirements of federal habeas corpus.

II. FACTUAL DEVELOPMENT IN INNOCENCE CASES

Finding evidence sufficient to provide a colorable claim of actual innocence takes years and is often a result of blind luck. For innocent, pro se inmates, their ability to get their claims properly before any court is incredibly daunting given the complexity of state post-conviction proceedings and federal habeas corpus. The shift in federal habeas jurisprudence to defer more to the rulings of state courts makes it even more important that no procedural missteps occur if inmates hope for substantive review of their evidence.[68] Expecting inmates, especially those asserting innocence, to navigate the collateral appeals process while avoiding procedural difficulties ignores the reality of the evidentiary requirement necessary for any successful review.

In non-capital cases, wrongfully convicted inmates have two primary options in developing evidence to support their innocence.[69] First, they can request aid from an innocence project or similar organization to both investigate their claims and represent them. Innocence projects are located in several states and are now a growing presence internationally. Innocence organizations differ as to the scope of cases they accept. This creates numerous complications due to the sheer volume of requests for assistance and the limited funding

68 *See* Harrington v. Richter, 131 S. Ct. 770, 781 (2011) (reversing the Ninth Circuit, which had granted federal habeas relief to a state prisoner, on the grounds that the court "fail[ed] to accord required deference to the decision of a state court"); Cullen v. Pinholster, 131 S. Ct. 1388, 1398–1400 (2011) (reaffirming that state courts are the proper forum to fully develop and litigate constitutional claims and that state court decisions are entitled to deferential review by federal courts); *see generally* 28 U.S.C. § 2254(d)(1)–(2).

69 Individuals charged with capital offenses are usually guaranteed defense counsel throughout their appeals. Because of the understanding that "death is different," those facing the death penalty have access to more resources and oversight. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). *See generally* McFarland v. Scott, 512 U.S. 849, 859 (1994) (holding that capital defendants are entitled to preappliction counsel to assist in filing their federal habeas corpus petitions). *See also* 18 U.S.C. § 3006A (2012) (governing the appointment and substitution of counsel in federal non-capital cases).

Additionally, the exonerations of those on death row demonstrates the extensive breakdown in the criminal justice system involving wrongful convictions. As of October 12, 2015, there have been 156 exonerations of those on death row. *See* DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (2016), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf

and staffing of innocence projects. Second, as Perkins did, the wrongfully convicted inmate may gather the evidence and proceed through state post-conviction and federal habeas corpus processes pro se. For those in states without innocence projects, this is the only way to develop new evidence and figure out how to litigate claims through the complex maze of collateral appeals. Given the reality of these factual and legal complexities, the federal courts must apply flexibility as inmates explain delays in pursing their innocence claims.

A. The Limitations of the Innocence Projects

Innocence projects focus their efforts primarily on investigating and litigating claims of factual innocence once their clients have completed their direct appeals.[70] Many of these organizations belong to the Innocence Network. Members of the Innocence Network, while distinct in the types of cases they accept, have the same mission, representing those who are wrongfully convicted as they seek to establish their actual innocence.[71] For many of the member organizations within the Innocence Network, the most daunting task is procuring facts to satisfy either the state or federal requirements for ac-actual innocence. Whether it be obtaining evidence for DNA testing or locating witnesses never interviewed by law enforcement, the efforts necessary to fully investigate a case require a great many resources.[72] Beyond that, the time involved often spans far beyond the one year statute of limitations provided under the federal habeas corpus statute.[73]

According to the National Registry of Exonerations, of the 1769 exonerations, the majority were non-DNA cases, where factual inves-

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70 Some innocence projects, like The Innocence Project, accept cases where only DNA establishes actual innocence. Some projects require an inmate having served a certain amount of time on their sentence to apply while others specialize in cases such as shaken baby syndrome or arson. *See* INNOCENCE NETWORK, *Innocence Network Member Organizations*, http://innocencenetwork.org/members/ (last visited Jan. 28, 2016) (showing the case acceptance requirements when a specific organization is selected).

71 *About the Network*, INNOCENCE NETWORK (Jan. 22, 2016), http://innocencenetwork.org/about; *see also* Stephanie Roberts Hartung, *Legal Education in the Age of Innocence: Integrating Wrongful Conviction Advocacy into the Legal Writing Curriculum*, 22 B.U. PUB. INTEREST L.J. 129, 134 (2013) (describing the Innocence Network and the work of innocence projects).

72 *See* Brief for The Innocence Network as Amicus Curiae in Support of Respondent, *supra* note 59, at 17–19 (describing the time-consuming and difficult investigations required to support a claim of innocence in pursuit of habeas relief).

73 *See id.* ("Innocence investigations rarely follow a linear path and are often marked by false starts, dead ends, and serendipitous "breaks" in the case that lead to exonerating evidence, sometimes many years after conviction."); 28 U.S.C. § 2244(d) (2012).

tigation from the ground up was necessary.[74] Such factual investigation involves a detailed review of every aspect of the case—starting with the crime itself, through the arrest and prosecution of the defendant—and a determination whether there is newly discovered evidence of innocence.[75] These investigations involve gathering records from prior defense counsel, all law enforcement agencies working on the case, forensic testing bench notes and reports, and relevant court records.[76] Once as much documentation about a case as can be gathered is assembled, the witness interview process often begins. Locating people connected with a case, either through police reports or court records, is not only time consuming, but also often a matter of trial and error, as people move, change their names, or die. Further, if any expert analysis, such as DNA testing, eyewitness identification, or fire analysis, is needed, collecting additional records or locating physical evidence will be necessary.

Because many innocence projects are affiliated with law schools, the investigation undertaken by law students in the clinical setting may slow down the speed at which records are obtained and reviewed, investigation is completed, and litigation drafted, given the significant educational component.[77] As part of their learning experience, law students are responsible for determining what records to collect, facts to develop, and what expert analysis must be done on the case assigned. Due to the complexities of these cases, students of-

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74 Number as of April 11, 2016 *Exonerations by Year: DNA and Non-DNA*, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited Apr. 11, 2016); *see also* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012, REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (finding that 63% of exonerees from January 1989 through February 2012 "were cleared without DNA evidence").

75 *See* Hartung, *supra* note 71, at 135–36 ("These non-DNA cases tend to be more complex and challenging, given that they frequently involve a dearth of irretuable evidence establishing factual innocence."); Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 364–69 (2011) (describing an empirical study of the work of innocence projects and the challenges of investigating and representing inmates that have been wrongfully convicted).

76 *See* Russell Stetler, *Post-Conviction Investigation in Death Penalty Cases*, CHAMPION, Aug. 1999, at 41-42 (describing the meticulous "paper chase" that must precede interviews of witnesseses in a post-conviction investigation).

77 *See* Keith Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects In Clinical Legal Education* 13 CLINICAL L. REV. 231, 231–32 (2006) (describing the growing presence of innocence projects in law school settings); *see generally* Hartung, *supra* note 71, at 141 (discussing different perspectives on the appropriate amount of responsibility to give to law students involved with innocence projects).

ten work in teams, breaking down the numerous assignments into much more manageable tasks.[78] All of this is done under the supervision of the clinical professor and staff attorneys who assist the students.

While the law students gain crucial practical skills in how to develop actual cases, these cases take longer to proceed because the students must be allowed to learn as they go.[79] Students often make mistakes and must research how to find court records or locate witnesses where an experienced attorney would quickly handle such tasks. Having an innocence clinic within a law school environment is not only good for the students, but also permits the very expensive factual investigation to occur for a fraction of the actual cost.[80] Because this area of law does not generate money for attorneys, there is very little impetus for lawyers to take these cases outside of pro bono efforts of larger law firms who can defray litigation costs.[81] The trade-off for clinics is the slower factual development and, likely, the filing of a viable case outside the federal one year statute of limitations.

Along with relying on student assistance, there are the additional problems of funding and staffing to assist these students. As mentioned, many innocence projects are affiliated with law schools or non-profits working within other state agencies or universities. As such, much of their funding comes from grants, private donations, and other similar funding sources.[82] While many law schools may cover the clinical professor position, they often do not cover the expenses such as: staff attorneys; paralegals; investigators, or other contract workers, like experts that are often required to handle the volume of cases that are necessary; court records; law enforcement records; and forensic reports. Therefore, without consistent outside revenue, key positions are lost or never funded to begin with and

78 *See* Hartung, *supra* note 71, at 137–38 (describing the collaborative nature of most innocence work in the law school setting).

79 *See* Findley, *supra* note 77, at 265–66 (discussing the trade-off of giving students greater responsibilities in innocence cases at the risk of delays or errors); *see also* Rose Ricciardelli, et al., *"Now I see it for What it Really is": The Impact of Participation in an Innocence Project Practicum on Criminology Students*, 75 ALB. L. REV. 1439, 1450–56 (2012) (describing results of a study of criminology students experiences reviewing claims of wrongful conviction for an innocence project).

80 Krieger, *supra* note 60, at 371–72 (discussing in detail the finances and budgetary constraints of innocence projects).

81 *See id.* at 372 n.234 (explaining that the average cost of an exoneration is $333,239). Non-DNA cases are likely to be higher given the amount of investigation and expert assistance needed to satisfy the high evidentiary standards. *Id.*

82 *See id.* at 383–84 (describing the difficulties in fundraising for project needs).

overall case productivity declines.[83] Often this combination of funding deficiencies and educational focus contributes to the slower factual development of many innocence cases.

Currently, there are fifty-five innocence organizations in the United States, but this does not equate to a project in every state.[84] Some states have several projects handling different types of innocence cases. For instance, some innocence organizations handle only DNA cases, represent only female inmates, or handle only first degree murder cases.[85] These limitations mean a dearth of qualified legal assistance for inmates seeking help in building their innocent cases for collateral and federal proceedings. Often they seek the assistance of any and every project with the hope of obtaining representation. As their options are slim to begin with, these inmates are often forced into representing themselves because they are unable to obtain representation.

B. Case Delays in Innocence Cases

Based on the work of innocence projects and attorneys, over a thousand inmates have been exonerated. The majority of these exonerations are non-DNA cases where inmates must navigate state post-conviction and federal habeas in order to show actual innocence. In these situations, inmates struggle to satisfy the high burden of proof and in many aspects are unable to do so due to procedural pitfalls of habeas jurisprudence. Federal courts continue to be frustrated with the seeming "delay" in bringing these cases within a one-year window promptly as anticipated under the AEDPA.[86] Even when they acknowledge the likelihood of a miscarriage of justice, the federal courts struggle with the procedural hurdles from state collateral proceedings as they evaluate constitutional claims.

As illustrated below, the cases of Darryl Burton, exonerated in 2008; Larry Pat Souter, exonerated in 2005; and Paul House, exonerated in 2009, demonstrate the challenges for both non-capital and

83 *See id.* (noting that the lack of full-time positions leads to an over reliance on less skilled voluneers).

84 *See* THE INNOCENCE NETWORK, http://www.innocencenetwork.org/members (last visited Feb. 16, 2016) (listing all the member innocence organizations, their location, and types of cases accepted).

85 *See, e.g., Innocence Network Member Organizations,* THE INNOCENCE PROJECT, *http://www.innocenceproject.org/* (last visited Feb. 16, 2016); *Women's Project,* CENTER FOR WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/womensproject/ (last visited Feb. 16, 2016); CENTURION MINISTRIES, http://www.centurionministries.org/ (last visited Feb. 16, 2016).

86 28 U.S.C. § 2244(d) (2012).

capital defendants in establishing their factual innocence within the strict confines of federal habeas corpus review.[87] The deficiencies of their trial and direct appeal attorneys of each of these men impaired their ability to properly achieve substantive review in federal habeas proceedings. Finding evidence establishing their innocence often came piecemeal making it harder for an inmate to fully articulate the reasons for his wrongful conviction. Specifically, if their Sixth Amendment counsel failed to provide adequate factual investigation of their cases pretrial or shortly after conviction, it negatively impacted on their ability to have substantive review in later proceedings. Therefore, some were successful in federal court, while others felt first-hand the current limits of the writ of habeas corpus in protecting the wrongfully convicted.

1. Darryl Burton: Exonerated from Missouri After Twenty-Four Years

Darryl Burton faced capital murder charges in the shooting death of Donald Ball at a gas station in 1984.[88] The state's case against Darryl rested primarily on two eyewitnesses: Claudex Simmons and Eddie Walker, Jr., who testified they saw him shoot Mr. Ball as he ran away across the gas station parking lot.[89] During the trial, the two eyewitnesses provided wildly inconsistent accounts of where they were, where they saw the shooter run afterwards, and what the shooter looked like.[90] Despite these inconsistencies, the jury convicted Darryl, sentencing him to life imprisonment without the possibility of parole for fifty years plus another twenty-five years for armed criminal action.[91]

Five months after Darryl's conviction, one of the eyewitnesses, Claudex Simmons, recanted his testimony: "I submitted perjury testimony [sic] to gain immunity from the herein-mentioned murder of one Donald Ball."[92] However, this recantation was not enough to overturn Darryl's conviction on either direct appeal or in state post-

87 *See* Stephanie Denzel, *Darryl Burton*, NATIONAL REGISTRY OF EXONERATIONS (Before June 2012), *https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3076*; Stephanie Denzel, *Larry Pat Souter*, NATIONAL REGISTRY OF EXONERATIONS (Before June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3656; *Paul Gregory House*, NATIONAL REGISTRY OF EXONERATIONS (Before June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3307.

88 *Darryl Burton*, *supra* note 87.

89 Burton v. Dormire, 295 F.3d 839, 842–43 (8th Cir. 2002).

90 *See* Burton v. Dormire, No. 06AC-CC00312, at 7–13 (Mo. Cir. Ct. Aug. 18, 2008).

91 *Id.* at 1.

92 *Burton*, 295 F.3d at 843.

conviction review.[93] Darryl filed a pro se federal habeas corpus petition raising sixteen grounds for relief.[94] However, much of the factual evidence supporting his innocence claim was found after he received the aid of Centurion Ministries.[95] They began investigating Darryl's case in 2000 and found significant evidence establishing his factual innocence but their assistance came after his pro se petition was filed.[96] Pro bono counsel working alongside Centurion Ministries began representing Darryl, entering an appearance to assist him in his federal habeas litigation.[97]

After Simmons' recantation, investigators found additional evidence refuting the state's case against Darryl. Namely, Simmons, one of the prosecution's eyewitnesses received benefits not disclosed to Darryl's defense counsel prior to trial.[98] Additional witnesses provided affidavits and deposition testimony that Walker, the other eyewitness, was not present at the scene, has a history of untruthfulness, and a history of vision problems all calling into question his identification.[99]

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93 *See* Burton v. State, 817 S.W.2d 928, 930 (Mo. Ct. App. 1991) (upholding trial court's denial of Burton's claim of ineffective assistance of counsel); State v. Burton, 710 S.W.2d 306, 308-09 (Mo. Ct. App. 1986) (affirming Burton's conviction on direct appeal). Darryl's post-conviction counsel did not raise an innocence claim in his motion, nor did the attorney conduct any substantive investigation to provide factual support for the constitutional claims raised. Missouri does provide post-conviction counsel to inmates, but this counsel falls outside the protections of the Sixth Amendment right to counsel.

94 Burton v. Dormire, No. 4:97-cv-00645, at 2–3 (E.D. Mo. Mar. 21, 2001) (Memorandum and Order) [hereinafter *Burton*, Memorandum]. Darryl's habeas corpus petition was timely, given that he filed it within the one-year statute of limitations from when the Anti-terrorism and Effective Death Penalty Act went into effect.

95 CENTURION MINISTRIES, *supra* note 85. Centurion Ministries is an organization that investigates cases of wrongful convictions. When a case is found, they contract with local counsel or law firms to represent the inmate in state post-conviction and federal habeas corpus proceedings.

96 *Darryl Burton*, CENTURION MINISTRIES, *http://www.centurionministries.org/cases/darryl-burton/index.php* (last visited Feb. 16, 2016). Presenting new evidence during the federal habeas state is problematic because the constitutional claims arising from this new evidence are more susceptible to exhaustion and procedural default challenges by the Attorney General or sua sponte by the federal court.

97 Appearance for Petitioner Darryl Burton, Burton v. Dormire, No. 4:97-cv-00645 (E.D. Mo. filed Apr. 4, 2000).

98 *See* Burton v. Dormire, No. 06AC-CC00312, at 2, 20–39 (Mo. Cir. Ct. Aug. 18, 2008) ("[T]he failure of the State to disclose Mr. Simmons' full criminal history was so prejudicial that it violated Mr. Burton's right to due process under the *Brady* doctrine."); *see also* Burton v. Dormire, 295 F.3d 839, 842-43 (8th Cir. 2002) (finding Burton's trial was not "rendered fundamentally unfair by the state's non-disclosure" and holding "Burton suffered no prejudice on account of the prosecutors' conduct").

99 Burton v. Dormire, No. 4:97-cv-00645, at 15 (E.D. Mo. Mar. 21, 2001) (Findings of Fact and Conclusions of Law and Judgment) [hereinafter *Burton*, Judgment].

Counsel for Darryl argued that the actual innocence gateway recognized in *Schlup v. Delo* provides a legal means to excuse any procedural defaults which would prohibit a federal court from reaching the merits of his constitutional claims.[100] So long as Darryl presented facts supporting his innocence such that no reasonable juror would convict, that would allow the federal court to examine his ineffective assistance of trial counsel claim on the merits.[101] Further, Darryl's counsel argued that he had provided factual support for his constitutional claims and sought an evidentiary hearing to fully present his case of actual innocence.[102] The federal district court denied his claim for relief finding that his ineffective assistance of counsel claim was procedurally barred or exhausted.[103] His request for an evidentiary hearing was denied, but the court certified four claims for review to the Court of Appeals for the Eighth Circuit.[104]

The court of appeals affirmed the district court's denial of relief but not before recognizing that Darryl was very likely innocent:

> The present case suggests we may not yet have achieved the optimal balance. Darryl Burton's habeas petition depicts a troubling scenario. One cannot read the record in this case without developing a nagging suspicion that the wrong man may have been convicted of capital murder and armed criminal action in a Missouri courtroom. Burton was convicted on the strength of two eyewitness accounts. Since his trial and imprisonment, new evidence has come to light that shakes the limbs of the prosecution's case. One eyewitness has recanted and admitted perjury. The other eyewitness's veracity has been questioned by a compatriot who avers it was physically impossible for him to have seen the crime. A layperson would have little trouble concluding Burton should be permitted to present his evidence of innocence in *some* forum. Unfortunately, Burton's claims and evidence run headlong into the thicket of impediments erected by courts and by Congress. Burton's legal claims permit him no relief, even as the facts suggest he may well be innocent. Mindful of our obligation to apply the law, but with no small degree of reluctance, we deny Burton a writ.
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> . . .
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> Burton's habeas petition troubles us because his legal claims do not provide him an adequate foundation upon which to present his considerable claims of factual innocence. Though our jurisprudence offers Burton no relief, we express the hope that the state of Missouri may pro-

100 *Burton*, Memorandum, No. 4:97-cv-00645, at 4.

101 *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) (explaining the factual burden that an inmate must meet for his evidence of actual innocence; specifically, no reasonable juror would have convicted the defendant had they known this evidence at the time of trial).

102 Burton v. Dormire, 295 F.3d 839, 848 (8th Cir. 2002).

103 Burton v. Dormire, No.4:97-cv-00645, at 14–16 (E.D. Mo. Aug. 7, 2000).

104 *Burton*, 295 F.3d at 844.

> vide a forum (either judicial or executive) in which to consider the mounting evidence that Burton's conviction was procured by perjured or flawed eyewitness testimony. In the final analysis, Burton may well be guilty, but the new evidence he has unearthed suggests his case at least deserves a second look.[105]

The district court and Eighth Circuit's inability to provide a meaningful way to litigate actual innocence, given a colorable claim, is troublesome for two reasons. First, because Darryl's counsel—at trial, direct appeal, and post-conviction review—failed to conduct a full factfactual investigation into his constitutional claims, Darryl was unable to obtain full federal habeas review.[106] The constraints applied by the AEDPA limited the federal court's ability to address his newly discovered evidence of innocence.[107]

Second, because the safety-valve measure that the innocence gateway is supposed to create did not protect Darryl's rights. The Eighth Circuit's analysis under *Schlup*, while acknowledging the strength of the newly discovered evidence indicating innocence, failed to credit the evidence uncovered as satisfying the constitutional claims raised. The limitations of the AEDPA handcuff the federal court's ability to properly assess innocence evidence. The difficulties of finding such evidence so long after the crime and of navigating through the mire of state post-conviction and federal habeas corpus only demonstrate the disconnect between the legal remedy and an inmate's ability to access it. For Darryl, it was only after he returned to state habeas proceedings, an option not available in many states, that he finally obtained an innocence finding on the very constitutional claim the federal courts believed meritless.[108]

2. *Larry Souter: Exonerated from Michigan After Thirteen Years*

The police did not immediately arrest Souter for the death of Kristy Ringler when she was found dead in the middle of the road in

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105 *Id.* at 842, 849.

106 Interestingly, Mr. Burton's ineffective assistance of counsel claims would likely give him a ground for relief, whereas his gateway innocence claim under *Schlup* would and did not.

107 *See* 28 U.S.C. § 2254(e)(1) (2012) (directing federal courts to defer to factual determinations by state courts through a presumption of correctness and permitting a habeas petitioner to rebut the presumption only "by clear and convincing evidence").

108 *Compare Burton*, 295 F.3d at 847 (8th Cir. 2002) (concluding Burton's trial was "not rendered fundamentally unfair by the state's non-disclosure of an alleged second plea agreement" and "Burton suffered no prejudice on account of the prosecutors' conduct"), *with* Burton v. Dormire, No. 06AC-CC00312, at 1, 42 (Cole Cnty. Cir. Ct. Aug. 18, 2008) (holding "[t]he failure to disclose . . . critical impeachment information was highly prejudicial" and "rendered Mr. Burton's trial fundamentally unfair").

1979.[109] Instead, the newly elected sheriff arrested Souter twelve years later, after publicly stating he would resolve unsolved cases.[110] Souter and Ringler met at a bar and later that same night followed a group to a friend's party.[111] Later in the evening, Ringler decided to walk home even though Souter attempted to talk her out of it.[112] Several people at the party mentioned Ringler had been drinking when she left the party.[113] She was found later that night dead in the middle of the road with lacerations on her head.[114] The police searched the scene and found a broken brown bottle with type A blood consistent with the blood types of both Souter and Ringler.[115] Souter told police the bottle belonged to him but it was not used against Ringler.[116] The neuropathologist who performed the autopsy theorized that the cause of death could have been either a car accident or a homicide.[117] Based on the police investigation and the medical examiner's autopsy report, the prosecutor chose not to bring charges in Ringler's death resulting in the case being closed.[118]

Four years later, at the urging of a police detective working on the case, a different medical examiner reviewed the autopsy and issued a report concluding, "the victim's wounds 'may well have been inflicted' by a whiskey bottle."[119] After the sheriff arrested Souter in 1991, the prosecutor sought charges against him for Ringer's death.[120] The prosecution's case was extremely weak, relying on circumstantial evidence of the glass found at the scene, the medical examiners' reports, and the testimony of a forensic pathologist who reviewed the autopsy report.[121] Souter was convicted of second degree murder and sentenced to twenty to sixty years imprisonment.[122]

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109 Souter v. Jones, 395 F.3d 577, 582 (6th Cir. 2005).

110 *See id.* ("No further investigation was done on the Ringler case until 1991, when a newly-elected sheriff, who committed his office to reviewing unsolved homicides, revived the effort to solve the case."); Report and Recommendation at 2, Souter v. Jones, No. 02-CV-00067 (W.D. Mich. Feb. 3, 2003) ("[Souter] was prosecuted in 1991 'with essentially the same evidence that was available in 1983.'").

111 *Souter*, 395 F.3d at 581.

112 *Id.*

113 Brief in Support of Petition for Writ of Habeas Corpus at 4 & n.14, *Souter*, 395 F.3d 577 (2002) (No. 1:02-cv-00067).

114 *Souter*, 395 F.3d at 581.

115 *Id.* at 582.

116 *Id.* at 581.

117 *Id.*

118 *Id.* at 582.

119 *Id.*

120 *Id.* at 582–83.

121 *Id.* at 583; *see also Larry Pat Souter*, *supra* note 87 (noting the defense offered several witnesses that supported Souter's story, including the original forensic pathologist consulted

Souter pursued relief on direct appeal and state post-conviction review with no success.[123] After a lengthy investigation which took more than the one year statute of limitations for federal habeas corpus, Souter found sufficient evidence of actual innocence.[124] The factual investigation done by Souter's counsel uncovered affidavits from the original medical examiner and the forensic pathologist recanting their testimony from Souter's trial and refuting the state's key pathology testimony.[125] Further, Souter presented an affidavit from a private investigator who interviewed the bottle manufacturer explaining that their glass was not constructed to have sharp edges.[126] Therefore, it was impossible for the broken bottle to cause the wounds on the victim's head and face. Lastly, photographs from the crime scene of the victim's clothes covered in blood supported the initial pathology finding that she was struck by a car.[127]

The federal district court granted the State of Michigan's motion for summary judgment because Souter's petition was filed beyond the statute of limitations.[128] Souter appealed his denial to the Sixth Circuit Court of Appeals on the grounds that newly discovered evidence of actual innocence is legally sufficient to trump the AEDPA one-year statute of limitations.[129] The Sixth Circuit found he presented ample evidence of actual innocence to equitably toll the federal statute of limitations:[130]

> Absent evidence of Congress's contrary intent, there is no articulable reason for treating habeas claims barred by the federal statute of limitations

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by police in 1979 who stated he believed Ringler was hit by a car and at least four witnesses in attendance at the party who either confirmed Souter's recollection or testisfied that he was not acting abnormally).

122 *Souter*, 395 F.3d at 583.

123 *Id.* His claims focused on the twelve year gap between the victim's death and Souter's arrest; however, the state courts found he was not prejudiced by the prosecution's delay. *Id.*

124 *See Souter*, 395 F.3d at 597 ("In light of the new evidence—the recanted testimony of Dr. Bauserman, the changed opinion of Dr. Cohle, the shape of the molds used in the manufacturing process, Hiram Walker's history of distributing the bottle without incident, the photos of the bloody clothes—we find that 'it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict.'"); *see also* Brief for The Innocence Network As Amicus Curiae in Support of Respondent, *supra* note 59, at 16 (describing Souter's new evidence and noting that the Court of Appeals for the Sixth Circuit reversed the district court's order holding Souter's habeas petition untimely).

125 *Souter*, 395 F.3d at 583–84.

126 *Id.* at 583.

127 *Id.* at 584.

128 *Id.* at 580.

129 *Id.* at 584–85.

130 *Id.* at 596.

> differently. Similar to our holding in the equitable tolling context, we conclude that against the backdrop of the existing jurisprudence and in the absence of evidence to the contrary, Congress enacted this new procedural limitation consistent with the *Schlup* actual innocence exception.[131]

The Sixth Circuit's key point of discussion in *Souter* is the importance of federal habeas as an equity right specifically designed to provide relief in these contexts.[132] When the Supreme Court recognized equitable tolling as a means to excuse an untimely habeas petition, the Court emphasized the Great Writ of Habeas Corpus as an equitable remedy specifically designed to alleviate such injustices.[133] The entire point of the Writ is to ensure the innocent a mechanism to gain relief when all other legal avenues fail. Upon remand to the district court, Souter's habeas petition was granted. The prosecution conceded all points raised in Souter's petition specifically agreeing that the twelve year delay actually prejudiced him.[134]

3. Paul Gregory House: Exonerated After Twenty-Two Years from Tennessee

Paul House faced capital murder charges for the death of Carolyn Muncey in 1985.[135] According to the state, the victim was raped and beaten near her home in rural Tennessee.[136] The state's case against House contained no direct evidence implicating him in Muncey's death. The prosecution relied on the fact that the blood found on House's clothes along with semen found on the victim's clothing was consistent with House's blood type, and on the testimony of two witnesses that they saw House near the location where the vicitm's body

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131 *Id.* at 599.

132 *Id.* at 597–98.

133 Holland v. Florida, 560 U.S. 631, 648–49 (2010) ("The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, §9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.").

134 *See* Report and Recommendation, *supra* note 110, at 3 ("The court noted that the Newaygo County prosecutor 'appears to have conceded in closing argument that the state was negligent in not pursuing the charges at least between 1983 and 1991.'"). Much of Souter's success rested upon his representation throughout the federal habeas process. Even though his petition was filed beyond the statute of limitations, his counsel was versed enough in the process to meet the procedural and substantive issues raised by the respondent.

135 House v. Bell, 547 U.S. 518, 521 (2006); *see also Paul G. House*, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3307 (describing details of the crime and House's arrest).

136 *Id. See also House*, 547 U.S. 518, 522, 526, 532-33.

was found.[137] The jury convicted House, sentencing him to death.[138] Similar to Darryl Burton, whose direct appeal and state post-conviction counsel failed to properly investigate and litigate both the facts and the constitutional violations supporting his innocence, House was denied relief in state court.[139]

House filed a second post-conviction pleading requesting investigative services to substantiate his actual innocence and ineffective assistance of counsel claim.[140] The state courts denied his post-conviction petition on the grounds that his claims were procedurally barred because he should have asserted them in his initial post-conviction pleadings.[141] House then filed a petition for writ of habeas corpus asserting his actual innocence as a means to bypass the procedural bars prohibiting a substantive review of his claims.[142] The district court granted the state's request for summary judgment on a majority of his constitutional claims based on procedural bars from state court.[143] However, the district court did allow an evidentiary hearing to ascertain whether *Schlup* innocence gateway would remove state procedural obstacles.[144]

Evidence establishing House's factual innocence rested on contamination of physical evidence, impermissibly withheld witness statements taken by the police, and new witness accounts incriminating the victim's husband.[145] Further, new DNA testing on the rape kit taken from the victim proved House had no sexual contact with the victim.[146] The Supreme Court found House's presentation of newly discovered evidence of actual innocence sufficient to waive the procedural bars preventing federal courts from reviewing his constitutional claims on the merits.[147] In demonstrating his actual innocence in federal court, not only did House have competent habeas counsel, but also he finally obtained the resources required for factual development—the resources that he could not obtain in state post-conviction proceedings.[148] Between his state post-conviction and fed-

137 *Paul G. House, supra* note 135.
138 *House*, 547 U.S. at 521.
139 *Id.* at 533–34.
140 *Id.* at 534.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 540.
147 *Id.* at 537, 555.
148 *See Paul G. House, supra* note 135 (describing House's factual investigation post-conviction).

eral habeas proceedings, it took House over ten years for the factual development of innocence.[149] Given the structural barriers created by incompetent trial and appellate counsel, it is hard to imagine House's ten year struggle to be deemed dilatory.

Deficiencies in the state court process faced by these three men in gathering the facts supporting innocence made it exceptionally difficult, if not impossible, to obtain relief in federal habeas corpus proceedings. The errors attributable to their trial counsels' negligence in not investigating the crime or avenues for a viable defense led to omissions of key evidence at trial. Exacerbating the problem was appellate counsels' failure to raise ineffective assistance of trial counsel claims with the necessary factual support that the Constitution requires. The Supreme Court seems to recognize the woeful impact of defense counsel who do not live up to the Sixth Amendment's mandate. The Court's recent decisions in both *Martinez* and *Trevino* provide an additional safety-value for procedural difficulties when counsel fails to adequately perform.

III. THE EXPANSION OF INEFFECTIVE ASSISTANCE OF COUNSEL AS A WAIVER OF PROCEDURAL DEFAULTS

As the Supreme Court considered the ramifications of the AEDPA statute of limitations on inmates asserting actual innocence, it also dealt with inmates facing complications in state court with viable ineffective assistance of counsel claims. The Sixth Amendment right to effective assistance of counsel protects a defendant from the time of charging through the end of direct appeal.[150] Ineffective assistance of counsel claims must be raised at the first available opportunity either on direct appeal or state post-conviction proceedings depending on what a state's statutes provide. Inmates asserting claims of ineffective assistance of counsel must establish their constitutional claim by proving that trial or appellate counsel provided deficient performance and that deficiency prejudiced the defendant.[151] Establishing deficient performance requires an inmate to establish his prior counsel's actions fell below an objective standard of reasonableness.[152] The Court advised that looking at prevailing norms will assist in determining whether an attorney's conduct fell below the objective standard of

149 *House*, 547 U.S. at 533–35.

150 U.S. CONST. amend. VI.

151 Strickland v. Washington, 466 U.S. 668, 700 (1984).

152 *Id.* at 681.

reasonableness.[153] Those prevailing norms can be the American Bar Association ("ABA") Rules for Defense Function, Capital Representation, or state bar requirements.[154]

Additionally, an inmate must demonstrate actual prejudice due to the failings of his trial or appellate counsel. This requires an inmate to prove what was not done that the attorney should have done. For example, if a defendant asserts his counsel failed to present an alibi defense, timesheets, or records showing where the defendant was at the time of the crime must be submitted along with credible witness affidavits or depositions testifying as to how they know of the defendant's whereabouts and why such evidence was not presented during his trial. Without such hard proof, the ineffective assistance of counsel claim fails on the prejudice element.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), post-conviction counsel's incompetence is not a cognizable claim in federal court.[155] Inmates attempted to excuse any procedural problems in their habeas petitions through the failings of their counsel in collateral proceedings. However, such actions gained no traction with the Court until recently. The Supreme Court had consistently held the deficiencies of a defendant's post-conviction counsel were insufficient to establish "cause" under the "cause and prejudice" doctrine to dismiss a procedural default once the case reached federal court.[156] The Court instructed that satisfying "cause" necessitates that a defendant prove an external impediment to himself or his

153 *Id.* at 688.

154 *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS (3d 1993); Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 919 (2003) ("[A] national standard of practice for the defense of capital cases . . . designed to express existing 'practice norms and constitutional requirements.'"). For cases citing professional guidelines to determine whether attorney conduct was reasonable, see, for example, Rompilla v. Beard, 545 U.S. 374, 387 (2005) (citing ABA guidelines to support holding that capital defense attorneys have a duty to review evidence prosecution will probably use in sentencing); Wiggins v. Smith, 539 U.S. 510, 521–26 (2003) (finding that the capital defense attorney's investigation fell short of professional standards to discover all reasonably available mitigating evidence); Williams v. Taylor, 592 U.S. 362, 371, 395–96 (2000) (finding that failure to conduct a thorough investigation of the defendant's background to discover and present significant mitigating evidence falls below professional norms for a capital defense attorney).

155 28 U.S.C. § 2254(i) (2012).

156 Coleman v. Thompson, 501 U.S. 722, 752 (1991); Murray v. Carrier, 477 U.S. 478, 492 (1986).

counsel for the failure to properly abide by state court rules either at trial, direct appeal, or in collateral proceedings.[157]

Similar to Perkins, Carrier, in *Murray v. Carrier*, filed a second pro se appellate brief raising a prosecutorial misconduct claim when his direct appeal counsel failed to do so.[158] When his appeal was denied, Carrier again raised the same claim in post-conviction proceedings only to have it dismissed by the Virginia courts.[159] In reviewing the state court action, the Supreme Court's holding prevented any consideration of why trial, appellate, or post-conviction counsel failed to properly argue or assert valid constitutional claims as a justification for excusing the procedural defects from state court.[160] Instead, errors of post-conviction counsel are imputed to an inmate on the justification that "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."[161] Only in a very narrow set of cases, such as when the state's actions deprived a defendant of effective assistance of counsel, might the cause requirement be met for the state procedural bar.[162] The Court continued to hold this position in subsequent cases.[163]

Against this backdrop, the Supreme Court's decision in *Martinez v. Ryan*, was a 180-degree turn from longstanding jurisprudence. Martinez argued that his Sixth Amendment rights were violated when his initial, court-appointed, state post-conviction counsel waived any potentially meritorious ineffective assistance of trial counsel claim when she filed his appeal.[164] Now armed with new collateral counsel, Martinez's second state post-conviction appeal asserted, for the first time, the lack of any investigation by trial counsel and overall failure to challenge the state's case.[165] The Arizona trial and appellate courts denied relief on procedural grounds, finding that his ineffective assis-

157 *Carrier*, 477 U.S. at 488. Based on the Court's rationale, official misconduct, like *Brady* violations, squarely fit as "cause" external to any actions of a defendant.

158 *Id.* at 482-83. The waiver doctrine allows state courts to dismiss constitutional violations not properly raised within state court procedural rules.

159 *Id.*

160 *Id.* at 488-89.

161 Coleman v. Thompson, 501 U.S. 722, 752 (1991) (citations omitted).

162 *See id.* at 754 (holding that the failure of counsel to timely file a notice of appeal was not "cause" within "cause and prejudice" to excuse a valid procedural bar; the procedural bar prevented the federal court from reaching the merits of the inmate's constitutional claims).

163 *Carrier*, 477 U.S. 478; Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); *see generally* 1 LIEBMAN AND HERTZ, *supra* note 66 § 2.5.

164 Martinez v. Ryan, 132 S. Ct. 1309, 1313–15 (2012).

165 *Id.* at 1314.

tance of trial counsel claim should have been raised on his initial collateral appeal.[166] The imposition of this procedural bar followed Martinez through to federal habeas corpus review where the district court and Ninth Circuit Court of Appeals denied the habeas petition on the same basis.[167]

Justice Kennedy, speaking for the majority, emphasized the unique nature of ineffective assistance of trial counsel compared with other constitutional violations raised in state post-conviction proceedings. Because such claims are so fact-intensive, leaving little-to-no template as to how to properly establish the elements of deficient performance and prejudice, it justified a narrow exception to the longstanding precedent set in *Murray v. Carrier* and reaffirmed in *Coleman v. Thompson.*[168] A defendant "needs an effective attorney" to fully develop a Sixth Amendment claim at the first available opportunity during post-conviction proceedings.[169] Full development depends upon fact investigation including records collection and possibly expert analysis of physical evidence in order for the constitutional claim to be properly litigated. "[W]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance of counsel, which often turns on evidence outside the trial record."[170] The Court's appreciation for the difficulties in locating hard evidence in the form of witness statements, court files, police reports, and expert testimony serves as justification for insisting that there be effective counsel in collateral proceedings given that the claim can only be raised during post-conviction. The Court found that only once an inmate is provided with effective legal representation to handle not only complex legal procedures, but also to procure the evidence necessary to prove both deficient performance and prejudice will a state be allowed to raise an independent and ad-

166 *Id.*

167 *Id.* at 1315.

168 *Id.*

169 *Id.* at 1317; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS § 4-8.6 (3d 1993) (explaining professional standards that defense counsel should adhere to in the post-conviction stage, particularly when to advise a client to pursue or not pursue an ineffective assistance of counsel claim).

170 Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012); *see also* Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (*citing Martinez*, 132 S. Ct. at 1318) ("[P]ractical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct review.").

equate procedural bar to ineffective assistance of counsel of post-conviction in federal proceedings.[171]

Trevino v. Thaler extended the cause and prejudice exception carved out in *Martinez* to apply to those states whose ineffective assistance of counsel claims must be raised on direct appeal to avoid the later imposition of procedural bars.[172] If a state's direct appeal process does not provide a sufficient framework for defense counsel to assess whether there was a viable ineffective assistance of counsel claim, then an inmate may have cause for excusing a procedurally deficient filing in federal court. Echoing the essential importance of defense counsel to the criminal justice system, the Court recognized the difficulties inmates suffered in trying to comply with state direct appeal rules. Trevino's defense counsel in both direct appeal and collateral proceedings failed to raise any ineffective assistance of penalty phase counsel claim.[173]

For those states requiring fact-based claims on direct appeal, there is usually a short window between a conviction and when the initial brief on direct appeal is due. Because of the compressed timing there was insufficient time to fully digest transcripts and pretrial records and then ascertain what factual development needed to be completed prior to filing the initial brief. The Court saw the systemic limitations on the ability of inmates to fully plead the Sixth Amendment claims under this framework.[174]

> The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, and on what grounds, to make a motion for a new trial. She then *may* have had an additional 45 days to provide support for the motion but *without the help of a transcript* (which did not become available until much later—seven

171 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1319–20 (2012) (explaining that failure to meet the standards of effective assistance of counsel in state post-conviction review allows litigants to bypass procedural bars to federal habeas review).

172 133 S. Ct. 1911, 1915 (2013).

173 *Id.* at 1915. In capital cases, a defendant has two separate trial phases: the guilt phase and the penalty phase. Defense counsel is expected to investigate and thoroughly prepare for both phases of a capital trial. Failure to do so may result in a finding of ineffective assistance of penalty phase counsel. *See* Rompilla v. Beard, 545 U.S. 374, 377 (2005) (holding that, for the sentencing phase, the capital defense counsel must investigate material that the prosecution will probably introduce as evidence of aggravating factors); Wiggins v. Smith, 539 U.S. 510, 524–26 (2003) (describing how the defendant's right to effective assistance of counsel was violated at the sentencing phase because the defense counsel failed to thoroughly conduct an investigation for mitigation evidence).

174 *Trevino*, 133 S. Ct. at 1918–19. "As the Texas Court of Criminal Appeals itself has pointed out, 'the inherent nature of most ineffective assistance' of trial counsel 'claims' means that the trial court record will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id.* at 1918.

> months after the trial). It would have been difficult, perhaps impossible, within that time frame to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances.[175]

Such evaluation and investigation is paramount to ascertain whether an inmate received the constitutionally mandated counsel she deserved during trial. Therefore, before a state procedural default on an untimely or deficient ineffective assistance of counsel of trial counsel claim can be applied in federal habeas, it is incumbent that both the state's collateral framework and inmate have somewhat competent counsel to evaluate the trial counsel's performance. Such attention to the inability of pro se inmates to meet the evidentiary burden of proof on ineffective assistance of counsel is telling given that Perkins was not given a similar benefit of the doubt. Also, the Court's acknowledgement that states are often haphazard in providing a collateral framework for inmates or their counsel to have not only the time, but also the resources to prove their prior counsel was ineffective due to failure to investigate, provide, or some factual error, is commendable but does not go far enough.

IV. FACT DEVELOPMENT IS FACT DEVELOPMENT: WHY THE DIFFERENCE BETWEEN INNOCENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL?

The difficulties facing inmates arguing innocence as a gateway for procedural problems are pretty much the same as those of an inmate raising ineffective assistance of counsel or official misconduct violations. In both situations, hard evidence from witnesses, physical evidence, forensic testing, experts, or other sources are required in order to satisfy the requisite actual prejudice standard.[176] Yet, the Court's treatment of actual innocence in *Schlup/House* compared with *Martinez/Trevino* ineffective assistance of counsel factual evidence development demonstrates a marked difference without a clear reason why. While a gateway innocence argument is not a constitutional violation in the way ineffective assistance of counsel or *Brady* claims are, the burden of proof—the necessity of arguing supporting facts with specificity—is strikingly similar.[177] Inmates are expected to present

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175 *Id.* at 1919.

176 *See* House v. Bell, 547 U.S. 518, 537 (2006) (describing the types of newly discovered evidence necessary for a gateway innocence claim to remove procedural defects on constitutional claims).

177 *See* Herrera v. Collins, 506 U.S. 390 (1993) (holding that a claim of actual innocence is not an independent ground for habeas relief); Brady v. Maryland, 373 U.S. 83 (1963)

substantive proof of their innocence while also explaining why that evidence could not have been properly presented during the course of their trial or initial appeal.[178] Similarly, not only must an inmate explain why his trial counsel failed to properly handle his case, but he must also demonstrate actual prejudice through exhibits showing what would have been presented had trial counsel been effective.[179] In both circumstances, the nature of the evidentiary proof is the same, requiring inmates without counsel, as is the usual course in both state post-conviction and federal habeas corpus, to provide concrete evidence is almost nigh to impossible.

A. What Inmates Actually Face

The Supreme Court has acknowledged the importance of counsel when ineffective assistance of counsel claim is raised but not for the factually innocent. Such a divide is troubling given that the lack of competent counsel often leads to wrongful convictions. Burton, Souter, House, and Perkins were all victimized by their trial and appellate counsels' failures. Clearly, these attorneys did not investigate their cases at trial given the evidence establish their innocence shown years later during their collateral proceedings. For these men navigating the criminal appellate system, they would now receive federal relief by arguing a Sixth Amendment ineffective counsel rather than gateway innocence. This reality causes one to wonder why an inmate would now pursue the *Schlup* gateway.

Another obstacle facing inmates raising innocence in federal court is the expectation that these often uneducated and uniformed inmates comply with the complicated requirements of state post-conviction and federal habeas corpus procedures, many of which are counterintuitive.[180] The reality is many inmates fail to litigate their claims properly at the first available opportunity or their court-

(requiring prosecutors to disclose evidence if it would be materially favorable to defendant at the guilt or punishment stage of a trial).

178 *See* Schlup v. Delo, 513 U.S. 298, 324 (1995); Segal, *supra* note 56, at 248.

179 Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (explaining why viable claims of ineffective assistance of trial counsel requires investigative work and an understanding of trial strategy).

180 *See* Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2129-30 (2002) ("Many inmates are uneducated, mentally impaired, or both. According to the statistics compiled in 1994 by the BJS, 47% of the adult inmates in the United States had less than a high school education and only 16% had some college education. For most inmates, 'attempting to read a law book would be akin to attempting to read a book written in a foreign language.'").

appointed collateral counsel—who are not held to the Sixth Amendment's standard—neglect to conduct an even miniscule review of the record or conduct the necessary investigation needed to protect these inmates' rights. When collateral counsel fails to properly review the case materials, evaluate the factual areas of deficiency, conduct the requisite investigation, and then file a fully developed appeal, there is little to no recourse for an inmate to overcome such lax representation in later appeals.[181] In such a system, it is all but a forgone conclusion that state procedural bars will be applied in federal habeas corpus review, tying the hands of federal courts in their ability to substantively review their convictions.

Given these apparent difficulties, why the Court continues to apply a harsher standard against the factually innocent is mystifying. What is so perplexing about the Court's holdings in *Schlup/House/Perkins* compared with *Martinez/Trevino* is that the same problems occur with both groups of inmates. Yet, the Supreme Court allows state inmates to trump state procedural defects through the "cause and prejudice" allowing a pathway to substantive review in federal habeas corpus. However, when factual innocence is asserted, trumping a federal statute of limitations, it is permitted, but with less factual-flexibility.[182] While the Court re-emphasized its commitment to protecting against miscarriages of justice in *Perkins*, the innocence gateway does little to ensure it. Without a greater understanding of how the wrongfully convicted ended up imprisoned, these people will not achieve the substantive review they are entitled to under the Constitution.[183]

Further, the Court seems unmoved by the difficulties faced by pro se inmates diligently trying to comply with the high burden of proof the innocence gateway mandates.[184] Evidence does not arrive in one clump but often is uncovered piece by piece leaving one to make a decision of filing early but with incomplete information or waiting until all evidence is gathered. Such a conundrum forces pro se in-

181 *See Martinez*, 132 S. Ct. at 1317 ("The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.").

182 *See* Holland v. Florida, 560 U.S. 631, 645 (2010) (explaining how 28 U.S.C. § 2244(d) is a non-jurisdictional federal statute of limitations and subject to waiver).

183 *See In re* Davis, 557 U.S. 952 (2009); Herrera v. Collins, 506 U.S. 390 (1993); Sawyer v. Whitley, 505 U.S. 333 (1992); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

184 *See supra* notes 59–60 and accompanying text.

mates to act immediately hoping to either gather more factual proof or legal assistance. The idea that an innocent person would wait in prison based on a conviction they had no part in for a witness to die shows callousness to the systemic problems that caused the wrongful convictions and the numerous landmines they must face to properly correct such travesties of justice.

B. Did the System Fail Perkins?

Perkins presented his affidavits showing the state's main witness was involved in the murder for which Perkins was convicted at the first available opportunity, in the best way he knew how.[185] Despite the constitutional deficiencies of his counsel, Perkins did so only after his direct appeal attorney failed to properly raise this evidence in his appellate brief.[186] The appellate court dismissed both pro se claims and held those claims procedurally barred.[187] Through no fault of his own, he was deprived of an actual review of the merits of his claims. Perkins was diligent in asserting his rights to the best of his abilities. Not only did he seek counsel for years and request the assistance of innocence projects in accepting his case, he tried to gather the necessary documents counsel would need to begin assessing his case.[188] Circumstances beyond his control, a prison riot and the subsequent destruction of his files, delayed his ability to comply in a timely fashion.[189] Perkins may, in fact, be innocent. However, he never had the professional assistance needed to fully develop this evidence and properly navigate it through the state collateral and federal appellate system. Therefore, he was deemed to have failed to properly protect his rights and was denied any meaningful review.[190]

Perkins may have been better served arguing an ineffective assistance of counsel claim in federal court rather than using the innocence gateway. Martinez took this route, even asserting in his federal habeas pleadings that while he was innocent of the charges, he was *not* asserting an innocence gateway claim.[191] Had Perkins raised an

185 McQuiggin v. Perkins, 133 S. Ct. 1924, 1929 (2013).

186 *See* Brief of Respondent, *supra* note 9, at 6–7.

187 *Id.* at 8.

188 *Id.* at 9–10.

189 *Id.* at 9.

190 Perkins v. McQuiggin, No. 2:08-CV-139, 2013 U.S. Dist. Lexis 125871 (W.D. Mich. Sept. 4, 2013).

191 Petitioner's Objections to Report and Recommendation at 2–4, Martizez v. Schriro, No. CV 08-00785 (D. Ariz. Oct. 6, 2008). Martinez may have been beyond the permissible one year statute of limitations under 28 U.S.C. § 2244(d) when he filed his federal habeas petition.

ineffective assistance of counsel claim on his post-conviction counsel for failing to properly raise his Sixth Amendment ineffective assistance of trial counsel claim on the basis of failure to investigate, he may have had more success in federal court.

V. HOW SHOULD THE COURT INTERPRET *PERKINS*?

> The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an 'obvious truth' the idea that 'any person haled [sic] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'[192]

If the right to counsel during trial and direct appeal is a fundamental right which will be protected if a state collateral process fails to provide adequate means to fully protect that right, then that protection should be doubly so for those wrongfully convicted. Federal habeas corpus has always been the legal mechanism to protect constitutional rights.[193] Yet, the actually innocent are treated harshly given that their prior counsel have also failed to protect their constitutional rights. As the circuit courts of appeals and district courts look to apply *Perkins*, their analysis should seek to ascertain to what extent prior counsel's failings impacted on the ability of the wrongfully convicted to locate evidence establishing innocence. Helping the federal courts grapple with prior counsel's failings requires them to look at four issues.

First, the inmate should articulate the methods taken to obtain either counsel or the assistance of an innocence-affiliated organization. This includes the timing of such requests in the criminal appellate process. For example, the inmate could provide copies of letters sent or confirmation of correspondence from various agencies who explain the timeframe of their substantive review of the inmate's case or their denial of assistance.[194] Supplying this documentation would prove the inmate had exercised due diligence in asserting actual innocence. If the inmate is successful in obtaining representation from either an innocence project or pro bono firm, through their representation, he can better articulate why their specific project or firm took longer than the one year statute of limitations to present sub-

192 Martinez v. Schriro, 132 S. Ct. 1309, 1317 (2012) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

193 Slack v. McDaniel, 529 U.S. 473, 483 (2000).

194 During my time as Director of two innocence projects, it was standard practice to alert inmates to the delay in responding to their request and the length of time it would take before substantive review of their files and subsequent investigation if a case called for it.

stantive evidence to the district court.[195] Not infrequently, the investigation itself may surpass one year as witnesses have moved, new witnesses are uncovered, and expert analysis of the crime must be undertaken.[196] As the district court evaluates timing in light of *Perkins*, its assessment of the new evidence must take into account the efforts of not only the inmate but those who may assist him in getting the case properly filed.

Second, the federal court must consider the internal obstacles of prison life that hinder an inmate's timely filing. Equitable tolling allows inmates to file beyond the statute of limitations when prisons obstruct an inmate's ability to comply with the statute.[197] Recognizing the institutional limitations that affect an inmate's ability to fully plead their innocence depends upon facilities prisons control. Where the prison mail facilities delay communications between inmates and the courts or prison unrest affects compliance with legal requirements, these circumstances should be considered when evaluating diligence. Many prisons have eliminated law libraries or curtailed their offerings for inmates.[198] Some prisons have gone to a sole computer based program, like Lexis or Westlaw, to provide legal materials.[199] While this is seen as progressive, few inmates understand how to use technology effectively and are able to arrange time to use it; thus they can be seriously hampered in their ability to properly grasp the legal machinations of state post-conviction proceedings and federal habeas corpus.[200] When prisons fail to provide access to legal materials or have law libraries, it is nigh to impossible for inmates to know about the interplay of state post-conviction on their federal habeas proceedings, the statute of limitations, or what burden of proof they must satisfy. Prisoners have no control over the ability to access

195 Given the Supreme Court's continued emphasis on ineffective assistance of counsel as a means beyond procedural bars, they should consider the delays in obtaining qualified post-conviction and federal habeas corpus counsel as within their emphasis of protecting the Sixth Amendment claim against trial counsel.

196 Brief Amicus Curiae For Former and Current Law Enforcement Officials in Support of Respondent, *supra* note 36, at 9 ("The passage of time becomes a crucial element of strategy in the context of difficult-to-investigate cases because changes in relationships beween people, as well as advances in technology, may lead to information which ultimately permits law enforcement officer to 'crack' the case.").

197 Holland v. Florida, 560 U.S. 631, 649 (2010).

198 Seamone, *supra* note 64, at 92.

199 *See* Abel, *supra* note 63, at 1211-15 (discussing the computerization of prison law libraries, including the increase in access to subscription search engines like Westlaw and LexisNexis).

200 *Id.*

the prison library, whether the prison goes on lockdown, or if they will be allowed access to their legal materials.

Without recognizing the institutional constraints inmates face, federal courts ignore hurdles preventing statutory compliance beyond an inmate's control. Perkins could do little about the riots which occurred or the resulting loss of his legal materials.[201] The Supreme Court's failure to consider this institutional hurdle holds inmates to an evidentiary burden the innocent cannot meet. Taking these factors into account would not increase the number of people who would be able to meet the extraordinarily high burden for gateway innocence claims. The actual innocence standard requires an inmate to show that, more likely than not, no reasonable juror would have convicted in light of the newly discovered evidence.[202] What it does provide is a mechanism to allow inmates and their legal representative to take the time necessary to properly build their claims at the first available opportunity as *Perkins* provided.

Third, if the inmate has any learning disabilities, or mental impairments, this should also be a factor in the court's calculus where diligence is concerned. Courts must come to understand the reality of those in prison trying to meet the high evidentiary burden of proof to substantiate their claims. Many prisons today lack not only adequate access, if any access at all, to legal materials but it is questionable whether the inmates understand the statutes and cases they read. Studies show a significant occurrence of mental illness amongst inmates.[203] These impairments were consistently seen across those in both state and federal custody and in both genders.[204] It is also interesting that younger inmates, those under twenty-four, had a higher occurrence of mental illness than those a few decades older.[205] As these younger inmates seek to challenge their convictions, their own mental deficiencies hamper their understanding of the law, their ability to communicate with the courts, and also to convey their legal issues to the limited pool of pro bono legal representation. Further, given that false confessions are one of the key indicators of a wrong-

201 Brief of Respondent, *supra* note 9, at 9–10.

202 *See* Schlup v. Delo, 513 U.S. 298, 327 (1995). As clearly demonstrated by Darryl Burton's case, and numerous others, even for those with strong evidence of innocence, the burden of proof cannot always be satisfied. *See supra* Part II.B.

203 *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem.").

204 *Id.*

205 *Id.* at 4.

ful conviction and occur at a much higher rate amongst those with mental disabilities, it is troubling that they are also the least likely to navigate the complex legal process to gain relief.[206]

Fourth, compounding this problem is the relatively low education level of many inmates. Approximately 40% of those in state prisons have not obtained a high school diploma.[207] The privatization of prisons and decrease in educational opportunities in many institutions causes this number to remain steady if not increase as those who want to obtain education may not have the opportunities to do so.

> These mental-health and educational deficiencies create a further impediment to prisoners' ability to conduct investigations and timely file petitions sufficient to obtain post-conviction relief: 'Given that many inmates do not have a high level of education and that many suffer from mental illness, navigating the post-conviction appeals process poses, at the very least, a daunting challenge.'[208]

Taking into account the individualized factors that may impair an inmate's ability will help explain why he may not have the ability to understand what he must file and when.

Finally, if the State objects to the delay in time that an inmate takes beyond the one year statute of limitations, it needs to articulate the actual prejudice it incurs from the delay. A consistent affirmative defense states argue is laches or a timing-based argument as used in *Perkins*, that such delay impairs the state from properly evaluating the inmate's claims.[209] Requiring the state to explain specifically the actual harm it suffers due to the delay makes a federal court assess whether their arguments are valid. In some situations, the state raises procedural defenses as a way to prevent a wrongfully convicted person from getting proper evaluation of their newly discovered evidence and supporting constitutional claims.[210] If the state's argument

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206 *False Confessions or Adminsions*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions (last visited Feb. 12, 2016).

207 CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 2 (2003).

208 Brief for the Innocence Network as Amicus Curiae in Support of Respondent, *supra* note 55, at 29 (citing Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 GEO. J. POVERTY L. & POL'Y 247, 259 (2011)).

209 *See* Medwed, *supra*, note 59, at 693–94, 693 n.249 (describing the challenges states face when allowing inmates more latitude to present new evidence).

210 *See, e.g.*, Milke v. Ryan, 711 F.3d 998, 1006–07 (9th Cir. 2013) (noting the trial court quashed Milke's subpoena for impeachment evidence based on the discoverability of the evidence and the specificity of the claim, rather than on the standard set forth in *Brady*); Wolfe v. Clarke, 691 F.3d 410, 418–19 (4th Cir. 2012) (dismissing the Commonwealth's assertions that the trial court erred "by generally excusing Wolfe's procedural defaults under the *Schlup* actual innocence standard; by authorizing discovery and conducting the

is meritorious, that it has actual impairment due to an inmate filing beyond the statute of limitation, it should elaborate on obstacles their investigators, support staff, or original prosecuting agency have in finding people or locating evidence, to the district court.

A. *Daniel Larsen: A Classic Example of How These Factors Would Impact A Federal Habeas Case*

A clear example of how a federal court can apply *Perkins* consistent with these proposals is *Larsen v. Soto*.[211] On June 6, 1998, police received an emergency call to respond to the Gold Apple Cocktail Lounge in Los Angeles, California based on shots being fired and the possibility of assault with a deadly weapon.[212] According to the 911 call, the suspect wore a green shirt and a ponytail.[213] Upon arrival, police found several people in the parking lot whom they asked to get on the ground.[214] According to the testimony of two police officers at the scene, Larsen "pulled a linear object, about five or six inches long from his waistband and threw it underneath a nearby car."[215] Larsen also matched the suspect's description due to his green shirt; however, Larsen had a shaved head inconsistent with the initial description.[216] Police placed Larsen under arrest and the prosecution later charged him with felonious possession of a deadly weapon.[217] Due to his past criminal history, this new charge qualified Larsen under California Three Strikes Statute. He faced life imprisonment.

During his initial preliminary hearing, the judge dismissed the charges against Larsen on the grounds that the prosecution failed to prove concealment, an element under the statute.[218] The prosecution

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evidentiary hearing; and by allowing Wolfe to amend his 28 U.S.C. § 2254 petition to broaden his *Brady* claim to include the Newsome report and other newly disclosed evidence"). Various constitutional claims have an actual prejudice element requiring a petitioner to explain with specificity the actual prejudice or harm they incurred do to whatever deficiency they argue occurred. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring actual prejudice as the second prong of ineffective assistance of counsel claims); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring materiality or actual prejudice for the failure to disclose a specific piece of evidence).

211 742 F.3d 1083 (9th Cir. 2013).

212 *Id.* at 1086; *see also* Maurice Possley, *Daniel Larsen*, THE NATIONAL REGISTRY OF EXONORATIONS (Jan. 27, 2014), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4350.

213 *Larsen*, 742 F.3d at 1086.

214 *Id.* at 1087.

215 *Id.* at 1086.

216 Possley, *supra* note 212.

217 *Larsen*, 742 F.3d at 1087.

218 Possley, *supra* note 212.

brought the same charges a second time but this time, one of the two arresting officers changed his story to provide a factual basis for the concealment element absent from the initial case.[219] On June 23, 1999, a jury convicted Larsen and the trial court sentenced him under the heightened sentence to twenty-eight years to life imprisonment.[220]

The California Innocence Project ("CAP") began reviewing Larsen's case in 2004 and found newly discovered evidence establishing his actual innocence.[221] At this point, Larsen was well beyond the one year statute of limitations for filing his federal petition. A year later, CAP filed a state habeas corpus petition arguing that Larsen received ineffective assistance of counsel as his trial attorney failed to investigate the case prior to trial, failed to have the knife examined for fingerprints, and did not produce third-party perpetrator evidence.[222] Demonstrating the actual prejudice Larsen incurred, CAP presented declarations from several people who said he was not the man with the knife. Instead, some of these new witnesses identified a man nicknamed "Bunker" as having the knife.[223] James McNutt, a retired Army Sergeant First Class and former chief of police, not only identified the alternate suspect, but provided the new suspect's motive for the crime. According to testimony, Bunker and Sergeant McNutt's stepson, Daniel Harrison, argued resulting in Bunker reaching into his pants taking out something looking like a knife.[224] Once the police arrived, it was Bunker, not Larsen who threw the knife under the car. Sergeant McNutt's wife, Elinore, corroborated this information. Both wondered why the police focused on Larsen when, from their perspective, he had nothing to do with the situation.[225]

Additional newly discovered evidence included admissions from the man originally identified as Bunker, William Hewitt. Both Hewitt and his girlfriend provided affidavits explaining that he, not Larsen, threw the knife under the car.[226] After learning of Larsen's arrest,

219 *See id.* (stating that the officer's new testimony asserted "that Larsen's shirt was untucked and covered the knife, and that Larsen reached under his shirt, grabbed the knife and threw it under the car").

220 *Id.*

221 *Id.*

222 *Larsen*, 742 F.3d at 1087.

223 *Id.*

224 *Id.*

225 *Id.* at 1087–88.

226 *Id.* at 1088.

Hewitt sold his motorcycle to bail Larsen out of jail.[227] When asked why he did not testify at Larsen's trial, he explained no one subpoenaed him.[228] Even with this extensive evidence demonstrating how Larsen's trial attorney conducted no investigation, which resulted in Larsen's conviction, California appellate courts denied Larsen relief without an evidentiary hearing.[229]

Larsen then pursued federal habeas corpus relief arguing his actual innocence and alleging ineffective assistance of counsel as his constitutional claim.[230] Even though Larsen acknowledged that he was several years beyond the statute of limitations for filing his federal petition, his actual innocence trumped the procedural bar in accordance with *Perkins*.[231] The federal magistrate granted Larsen an evidentiary hearing on the limited question as to whether he met the *Schlup* standard for actual innocence.[232] He presented the witnesses whose affidavits were initially presented in state collateral proceedings.[233] These witnesses confirmed their original statements explaining the events of that night, including the actions of the Los Angeles Police who originally responded to the scene.[234]

One of the key facts revealed during the former police chief's testimony is that he was not initially contacted by anyone until two and a half years after the crime.[235] For several years after his conviction, but prior to the California Innocence Project accepting his case, Larsen attempted to obtain representation from other attorneys to help him pursue his claims, but all of these attempts proved unfruitful.[236] As is often the case, Larsen was one of many inmates who try and try again to find anyone who can assist them after direct appeal. These inmates understand that, without counsel who has the expertise and training to find the newly discovered evidence and who are skilled or

227 *Id.*

228 *Id.*

229 *Id.* at 1087–88; *see also* Possley, *supra* note 212.

230 *Larsen*, 742 F.3d at 1088.

231 *Id.* at 1088–89; *see also* McQuiggin v. Perkins, 133 S. Ct. 1924, 1934 (2013) ("[A] first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.").

232 *Larsen*, 742 F.3d at 1088–89.

233 *Id.* at 1089 (noting he called Sergeant McNutt, Elinor McNutt, and Brian McCraken).

234 *Id.* at 1090–91. Given that the State's case hung crucially on the testimony of several officers, the witness accounts of the police acting inconsistently would have been of great importance to the jury. *See Id.* at 1091 ("[Magistrate Judge Segal] concluded that, in light of the evidence Larsen presented, 'no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'").

235 *Id.* at 1089.

236 *Id.* at 1093.

competent in weaving their cases through the mire of post-conviction and federal habeas corpus, they are unlikely to be exonerated. While Larsen was successful in obtaining counsel, Perkins, who presented three witness affidavits gathered by his family, was not.

The magistrate judge found that Larsen proved his actual innocence permitting his untimely constitutional claim substantive review. She evaluated Larsen's evidence supporting his Sixth Amendment ineffective assistance of counsel claim. The magistrate found that Larsen's trial counsel was ineffective for failing to investigate his case prior to trial.[237] The district court adopted the magistrate's findings and ordered Larsen's release pending the prosecutor's office deciding to retry him.[238] The State appealed the decision.

The Ninth Circuit's analysis focused solely on whether Larsen's habeas petition was validly before the district court given it was filed beyond the statute of limitations. Applying *Perkins* to the case, the court examined Larsen's actions from the time of his conviction to his filing in federal court, specifically whether he had been inexplicably dilatory.[239] Focusing on a finding of the magistrate that wrote the reality for many wrongfully convicted persons, "no petitioner who is actually innocent would choose to remain silent about his federal habeas claims for more than a year."[240] The Court of Appeals went further and documented every action Larsen took to get his trial counsel to do his job, and to get the critical evidence before a court in some substantive way:

> At trial, [Larsen] pled not guilty. In his declaration in support of his Petition, [Larsen] stated that he asked his trial attorney to present exculpatory evidence from Hewitt, Owen, and others. When [Larsen] became aware of the McNutts' exculpatory testimony, he asked his trial attorney to move for a new trial and unequivocally stated, "I'm innocent."
>
> [Larsen] continued to assert his innocence after his conviction. Between his conviction in 1999 and the start of the California Innocence Project's representation in 2002, [Larsen] contacted nine different attorneys or legal organizations for assistance in proving his innocence.[241]

Courts must take into account the specific actions of an inmate in seeking assistance and trying to locate newly discovered evidence of actual innocence. Larsen, while incarcerated, did everything in his power to protect his rights within the limited power he possessed. He was indigent, without the means either inside or outside to effectively

237 *Id.* at 1091.
238 *Id.*
239 *Id.* at 1092–93.
240 *Id.* at 1092.
241 *Id.* at 1093.

investigate his case beyond what little he knew of witnesses who could corroborate his story. He told his trial attorney to pursue leads pretrial, but his counsel elected not to investigate or present exculpatory evidence. Recognizing that Larsen had not "sat on his rights," the Ninth Circuit affirmed his grant of relief.

Such analysis as applied by the Ninth Circuit, ensures that a wrongfully convicted person is not unduly penalized when the factual development of his claim takes considerably longer than 2244(d) anticipated. Larsen's constitutional claim focused on the ineffectiveness of his trial counsel, arguing directly to the underlying thread of the importance of fact development for both innocence and effective assistance of counsel. In both instances, when an investigation does not occur as the Constitution intends during pretrial proceedings, it inevitably will take longer for a wrongfully convicted inmate to acquire evidence establishing innocence. As is the case, where the McNutts moved out of California in the following years while Larsen languished in prison, it is a reality that an inmate operates at a distinct disadvantage marshaling the resources necessary to locate and interview witnesses who support his claim.[242] There was no way for him to contact them or bring them back for a hearing without the resources of an innocence project or pro bono agency. This is exactly the reason investigations go beyond the time allotted. When newly discovered evidence and their accompanying constitutional claims need concrete proof, that proof often scatters to the four winds.

After evaluating the reasons behind Larsen's delay, both the magistrate and Ninth Circuit Court of Appeals looked to the state's insinuation that the six year delay may have affected their ability to rebut the newly discovered evidence presented.[243] The state's concern focused on its inability to properly vet the credibility of the inmate's factual evidence given the lapse of time. This argument is disingenuous for two reasons. First, the state rarely addresses the facts of a case during federal habeas corpus. Instead, it relies heavily on procedural

242 *See id.* at 1094 ("Furthermore, three years to locate witnesses scattered across the country, gather declarations, and file Larsen's petition is not so lengthy a time as to be unreasonable. Certainly, that his attorneys were thorough in preparing his petition does not undermine the reliability of Larsen's evidence. And at any rate, the Warden has not explained why the California Innocence Project would choose to become complicit in Larsen's supposed scheme to spare Hewitt from prosecution by delaying in filing the petition.").

243 *Id.* at 1094–95 ("Most importantly, the Warden has not explained how any delay in filing by Larsen has prejudiced the State or benefitted Larsen. . . . For example, the Warden has not argued that any prosecution witnesses who testified at Larsen's trial have since died or become unavailable.").

objections to the constitutional claims raised in federal habeas corpus. The state is aware of the intricacies of federal habeas corpus and knows inmates will be tripped up by these complexities. Often, inmates with viable constitutional claims are trapped in the mire of procedural obstacles regardless of whether the state suffers any actual harm because of them.[244] Because a federal court must address the procedural concerns before reaching the factual merits, the state emphasizes these areas in hopes of thwarting any substantive review. Even when newly discovered evidence is presented, there is no need by the state to address it if they can focus on procedural affirmative defenses to limit the scope of federal review.[245] Both the federal court and Ninth Circuit acknowledged that without more concrete proof of injury, a bald assertion of the extra delay causing some demonstrable harm is meritless.

Second, as the Court looks to evaluate newly discovered evidence and constitutional claims, the credibility assessment looks to the record as it existed at the time of trial. According to *Schlup*, federal courts must determine whether a reasonable juror would still convict the inmate had the juror been presented with the evidence of actual innocence at the time of trial.[246] As a federal court makes that determination, looking to the witness testimony and the prosecution's and defense's arguments at trial determines whether the inmate has met the burden.[247] Because the innocence assessment is backward looking, the State cannot change tact or replace a better argument now for the one the jury heard when it chose to convict. The record as it existed originally is what is evaluated to determine the value of the new evidence and constitutional issues. As the trial transcript and pretrial documentation speak for itself, there is little actual harm suffered by the State due to a delay. Arguing a new theory of the case to address newly discovered evidence of innocence does not coincide with the cumulative assessment precedent requires.

The magistrate judge emphasized that a laches-type argument must be accompanied by some demonstration of actual prejudice if it will suffice as an affirmative defense. The Supreme Court cautioned against a similar argument when emphasizing that a merits assess-

244 Exhaustion is required due to comity between the state and federal courts. Procedural bars are upheld even when state courts give no explanation as to why they were imposed. Harrington v. Richter, 131 S. Ct. 770, 787 (2011).

245 28 U.S.C. § 2254(d) (2012).

246 Schlup v. Delo, 513 U.S. 298, 326–27 (1995).

247 House v. Bell, 547 U.S. 518, 522–23, 531–33 (2006).

ment must occur when the stakes are this high.[248] Asking the State to articulate some clear, demonstrative harm by the inmate's delay ensures that if the delay is a problem, it can be addressed during an evidentiary hearing where witnesses for both the State and defense could testify. Further, both sides could fully articulate their positions. However, a state's weak explanation that some of the trial witnesses have died does not qualify given that the trial testimony already exists and will be accepted as true. Unless the state can explain how the trial record is deficient in some way or how the newly discovered evidence changes it in some irreparable way, the argument should fall to viable evidence of innocence. Seeing as newly discovered evidence of innocence, ineffective assistance of counsel, and official misconduct claims require a cumulative assessment of the evidence not presented at trial along with the new evidence uncovered, the state must show some actual, demonstrative harm for the time beyond the statute of limitations.[249] Without showing such, federal courts, like the magistrate in Larsen, should dismiss such arguments as meritless.

CONCLUSION

Six years is the difference between a finding of innocence and not. For Perkins, the six year period between his last state filing and his federal habeas petition was too much but for Larsen, it was understandable. The difference between the two comes down to counsel. As the Court long ago recognized, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[250] However, the right to counsel extends only through trial proceedings and a defendant's first appeal. Such restrictions leave inmates to fend for themselves as they navigate the next two levels of criminal appeals. Given the complexity of the state collateral system and federal habeas corpus, few inmates, much less the wrongfully convicted, will be able to successfully navigate this minefield without competent legal assistance. Without counsel, navi-

248 McQuiggin v. Perkins, 133 S. Ct. 1924, 1936 (2013) (arguing for a distinct dilligence finding because, "[t]he State fears that a prisoner might 'lie in wait and use stale evidence to collaterally attack his conviction . . . when an elderly witness has died and cannot appear at a hearing to rebut new evidence.'").

249 *Schlup*, 513 U.S. at 314–16 (discussing newly discovered evidence in light of the strength of the State's case at trial); Kyles v. Whitley, 514 U.S. 419, 421–22 (1995) (explaining how *Brady* evidence must be evaluated cumulatively both with the evidence presented and the evidence impermissibly withheld); *see also* Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (explaining the cumulative review of both evidence presented at trial and evidence trial counsel failed to present under ineffective assistance of counsel claims).

250 Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

gating the wrongfully convicted to find the evidence necessary to exonerate them is almost impossible. As the Supreme Court continues to make in-roads to allow inmates blocked by increasingly unsympathetic state collateral process, such flexibility must be even greater for the actually innocent. While the Court believes that wrongful convictions are a small subset, the sheer numbers and frequency of exonerations challenges this belief. Federal courts must continue to provide flexibility to those seeking relief from wrongful convictions when they take additional time not only to find evidence establishing innocence but wait even longer for counsel to assist them. Innocence is hard enough to prove both factually and legally. It is time the federal courts embraced this fully.